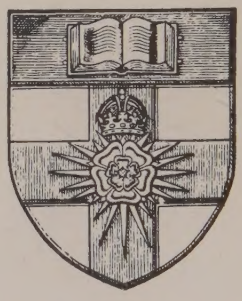
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346 Mx: North Gall.



UNIVERSITY OF LONDON
LIBRARY

THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. XI.

LONDON:

STEVENS AND HAYNES,

Law Publishers,

BELL YARD, TEMPLE BAR.

1916.

BIBL. LONDIN UNIV.

This Volume should be cited as 11 Cr. App. R.

BIBL.
LONDIN.
UNIV.

INDEX TO APPELLANTS' NAMES.

	PAGE
ABRAMOVITCH, Jacob	45
Ahlers, Nicholaus, Emil, Hermann	63
Altshuler, Abraham	243
Anon.	281
Aubrey, John	182
BACON, Frederick	90
Baird, Walter Lucien	186
Baker, Arthur	175
Barker, Arthur Sidney	191
Berger, Edward	72
Bray, Daniel	280, 290
Bray, Samuel	280
Brenner, Philip	203
Bruhin, Louis	276
Buol, Hans	305
Burgwin, Charles Albert	288
Burgwin, Frederick Ernest	288
Burgwin, William Henry	288
Burlison, John	39
CAUSTON, Ernest St. George	256
Colbeck, Thomas William	146
Conduit, William	38
DANIELS, Albert John	101
Davies, William	272
Davis, Sam	52
Douglas, Ernest	185
EVANS, George	60
Evans, Thomas	178
FENLON, Louis Allen	12
Fowles, George	5
Franks, Nathan	104
Freeman, Arthur Samuel	280
GARDNER, Arthur	265
Gilbert, Tom	23
Golathan, Alfred	79
Goldstein, Morris	27
Gorges, Richard	259
Gregory, George	130
Grubb, Frederick Ernest	153
HALL, John Hunter	221
Hampson, Thomas	75
Hampton, Herbert Baldwin	117
Hancox, Frank	265
Havard, Arthur James	2
Hill, William	304
Holmes, Thomas Charles	130
Hopper, William	136
Hopley, Samuel	248
Hughes, Arthur	10
INGLESON, Christopher	21

	PAGE
JOWSEY, Frances May	241
Jukes, Cornelius	34
KAHN, Ludwig	280
Kelly, James	12
Ketteridge, Frederick Arthur William	54
Kun, Lee	293
Kupfer, Albert	91
Kurash, Hyman	166
LAURENS, Alfred	215
Lawson, Arthur	215
Lesbini, Donald	7
Light, Arthur Dennison	111
MATTHEWS, John	288
McCallum, Winston John	3
McCulloch, Frederick Graham Gordon	51
Melik, Gregory	100
Metz, Johan	164
Millington, William	86
Morris, Henry	43
Morrison, Evi	278
Myers, Morris	115
M.	207
NORMAN, George Walter	58
OPPENHEIMER, Julius	146
Owen, Charles Henry	292
PAGE, William Henry	191
Park, Colin Archibald Mungo	304
Peacock, Ellen Clara	142
Peacock, Grantley Arthur	142
Peacock, Herbert Charles	142
Platt, Nathaniel Charles	172
RADFORD	278
Rappoport, Alexander	205
Read, Ernest	89
Rhodes, James William	33
Richards	278
Ryle, William Henry	312
Robinson, Benjamin Edward	4
Robinson, Harry	124
SANDERSON, Henry	197
Schama, Isaac	45
Scheffer, Sam	1
Seckree	245
Simpson, William George	218
Smith, Annie	36
Smith, Albert William	81
Smith, George Joseph	229
Smith, William	19
Spencer, George Newton	30
Stallwood, Walter	162
Starling, Agnes Jane	240
Stockdale, Henry	108
Studer, Hans Paul	307
TAYLOR, Betsy	41
Taylor, Henry	198
Thornley, John James	270
Tonks, Annie	284
Turner, James	26
VEALE, Leonard	114
WARD, Edward	245
West	34
Wilde, Harry	34
Wilson, William Frederick	251
Wood, George Henry	53
YOUSRY, Seham	13

TABLE OF CASES CITED.

[*The letters* "R. v." *in criminal cases are omitted.*]

PAGE

Abramovitch (1914) 86, 88, 132, 183, 192
Ady (1835) 112
Alexander (1913) 8, 9

Baird (1915) 231
Baker (1912) 21, 79, 80
Ball (1911) 230
Barron (1914) 285
Bates (1911) 164, 166
Berry (1897) 300
Bertrand (1867) 294, 297
Best (1909) 267
Booth *v.* Helliwell (1914) 154
Bottomeley, *Ex parte* (1909)..... 297
Boyden (1864)..... 301
Boyle and Merchant (1914)...230, 308
Brown (1908) 180
Bullivant *v.* A.-G. for Victoria (1901) 234
Button (1900) 112, 126, 129

Cargalis (1876).....303
Carpenter (1908) .....275, n.
Carter, Harris (1912) .....48, n.
Chitson (1909) 167, 171
Christie (1914) ...188, 227, 230, 243, 244, 267
Clark (1817) 132
Clark (1820) 285
Cohen and Bateman (1909) 225
Continental Tyre Co. *v.* Tilling (1915) 154
Cox and Railton (1884) 234, 238
Coyne (1905) 14
Crane (1912) 73
Crippen (1911) 55, 232
Crowhurst (1844) 47
Curtis (1913) 14

De la Porte (1895) 15, 17
Dixblanc (1872) 301

PAGE

Dredge (1845).. 20
Dugdale (1882) 127
Duncan (1890)? 200

Eagleton (1885) 124, 125, 129
Ellis (1910) ...119, 167, 187, 188, 189
Emery, *Ex parte* (1909)..... ... 300
Evans and Connor (1914)..... 179

Felstead (1914) 199, 201, 202
Fenton (1830)..... 262
Field (1910)..... 47
Fisher (1910) 119, 167, 170, 187, 189, 251, 254
Fitzgibbons (1912)..... 8
"Flowery Land" Case (1864)... 301
Fowler (1821) 56
Francis (1874)..... 232
Friel (1890)..... 285
Fuidge (1864) 164
Fullagar (1879) 155

Geering (1849) 232
Governor of Stafford Prison (1909) 300
Gray (1866)..... 231
Grubb (1915) 216

Hagan (1913) 47
Hall (1886) 231
Hampton (1909)..... 138
Hargreaves (1910) 198
Harmer (1848) 47
Hemingway (1912)..... 198
Hensler (1870).....111, 112, 113
Heron (1913) 108
Hill (1912) 19, 20
Hirst (1896)..... 267
Hopper (1915)..... 261
Horn (1912)..... 138

	PAGE
Ingleson (1914)	34, 80
Jefferson (1908)	25
Johnson (1909)	179, 180, 182
Johnston, David (1913)	58, 82, 83
Jones (1898)	188
Kingston (1806)	14
Kinnear (1819)	56
Kurash (1915)	253
Kwok Leung (1909)	294, 297, 303
Laitwood (1910)	127
Leary (1913)	19
Lee (1908)	198
Leung, Kwok (1909)	294, 297, 303
Linneker (1906)	128
Lockett (1914)	14
Lord (1905)	156
Lyons (1864)	301
Makin *v.* Attorney-General for New South Wales (1894)	17, 40, 230, 231, 235, 236
Male and Cooper (1893)	267
Mason (1914)	232
Maxfield (1912)	108
May (1912)	138
Meade (1909)	260
Metcalfe (1835)	120
Miles (1890)	285
Mills (1857)	112
Moore (1892)	294
Morphew (1814)	294
Morris (1867)	285
Neilson (1913)	108, 109
Newman (1852)	16
Norman (1914)	82, 83
Norton (1910)	243, 244, 285
O'Brien (1909)	179
O'Connell (1845)	55
Oldham (1852)	246
Ollis (1900)	188
O'Neill (1843)	56
Oxenham (1876)	120, 122
Perkins *v.* Jeffrey (1915)	230
Powell (1909)	47
Pritchard (1836)	300
Reed, *Ex parte* (1858)	179
Rhodes (1914)	80
Roberts (1855)	125, 127, 129
Robinson (1796)	307, 309
Rodley (1913)	39, 40, 41, 168, 170
Roebuck (1856)	112, 113
Rothwell (1871)	219
Salomon *v.* Salomon (1897)	154—6
Schama (1914)	86, 88, 132, 183, 192
Schmidt *v.* Van der Veen (1915)	93, 94
Smith, Richard (1910)	48
South (1907)	156
Stoddart (1909)	47, 225
Streek (1826)	294
Sullens (1826)	119
Summers (1914)	108
Vandercomb (1796)	285
Waller (1910)	164, 165
Walsh (1812)	119
Wann (1912)	15
Ward (1867)	55, 57
Warner (1908)	198
Welsh (1869)	7, 9, 137
Westwood (1913)	108
White (1910)	127, 128
Wiley (1850)	73, 74
Wilson (1848)	249
Willmont (1914)	55

TABLE OF STATUTES.

PAGE

1351. 25 Edw. 3, st. 5, c. 2 (The Treason Act) 63

1824. 5 Geo. 4, c. 83 (The Vagrancy Act),
ss. 4, 5 ..... 178—182
s. 14 180

1827. 7 & 8 Geo. 4, c. 28 (The Criminal Law Act) 201

1836. 6 & 7 Will. 4, c. 111 (The Previous Conviction Act) 197

1848. 11 & 12 Vict. c. 78 (The Crown Cases Act), s. 1 ..... 198, 201, 202

1851. 14 & 15 Vict. c. 99 (The Evidence Act) 198
c. 100 (The Criminal Procedure Act) 112

1861. 24 & 25 Vict. c. 96 (The Larceny Act),
s. 45 307
s. 58 245
c. 99 (The Coinage Offences Act), s. 37 197

1865. 28 & 29 Vict. c. 18 (The Criminal Procedure Act), s. 4 15

1869. 32 & 33 Vict. c. 62 (The Debtors Act), ss. 13, 11 (3) 143, 187

1870. 33 & 34 Vict. c. 23 (The Forfeiture Act), s. 2 101

1871. 34 & 35 Vict. c. 112 (The Prevention of Crimes Act),
s. 15 ..... 178, 179, 180

1885. 48 & 49 Vict. c. 69 (The Criminal Law Amendment Act), s. 2 (1). 28

1891. 54 & 55 Vict. c. 69 (The Penal Servitude Act), s. 7 178

1897. 60 Vict. c. 18 (The Juries Detention Act) 55, 57

1898. 61 & 62 Vict. c. 36 (The Criminal Evidence Act), s. 1 (f) .. 187, 251, 253
(The Indian Criminal Procedure Act),
arts. 360, 361 297

1901. 1 Edw. 7, c. 10 (The Larceny Act) 123, 225
s. 1 (1) ..... 153—157, 215, 216

1907. 7 Edw. 7, c. 23 (The Criminal Appeal Act) 286
s. 4 (1), proviso 13, 48, 50, 109, 153, 164, 191, 259, 293
s. 5 (2) 141
s. 5 (4) 25
s. 15 (2) 38
s. 20 (2) 178
s. 20 (4) 201

PAGE

1908. 8 Edw. 7, c. 45 (The Punishment of Incest Act), s. 1 (1) 210
c. 59 (The Prevention of Crime Act),
s. 10 (4) (a)..... 165
(b)..... 38
c. 67 (The Children Act),
s. 12 (1), (4) .....284—288
s. 30 .....272, 274

1913. 3 & 4 Geo. 5 (The Bankruptcy and Deeds of Arrangement Act),
s. 5 (1) (a) 81, 82, 85

1914. 4 & 5 Geo. 5, c. 12 (The Aliens Restriction Act) 65, 67, 69
c. 29 (The Defence of the Realm Act)..... 211
c. 58 (The Criminal Justice Administration Act),
s. 1 (2) 30
(4).....164, 165
s. 28 (2).....272, 274
c. 87 (The Trading with the Enemy Act).....91, 92, 97, 146, 148, 150
5 Geo. 5, c. 8 (The Defence of the Realm Consolidation Act) ... 207
c. 12 (The Trading with the Enemy Amendment Act).....91, 92, 97

1915. 5 Geo. 5, c. 34 (The Defence of the Realm (Amendment) Act),
s. 1 (3) 207, 209, 211

CRIMINAL APPEAL RULES.

R. 8 (c) 270
R. 26 (d)..... 201
R. 39 (c) 52

ERRATA.

Page 8.—*For* "7 Cr. App. R. 204," *read* "264."
Page 82.—*After* "Norman's Case," *read* "(p. 58, above)."
Page 155.—*After* "44 J. P. 57," *insert* "(1879)."
Pages 276, 277, 305, 306.—*For* "Chairman," *read* "One of the Deputy-Chairmen."

BEFORE

MR JUSTICE RIDLEY, MR. JUSTICE DARLING, AND MR. JUSTICE BRAY.

SAM SCHEFFER.

1914
18 *August.*

The Court will not hear an appeal against conviction, for which its leave is necessary, unless such leave has been formally asked.

This was an application for leave to appeal against sentence. Appellant was convicted, at the Central Criminal Court, on the 20th July, 1914, before the Recorder, of attempted procuration, and was sentenced to eighteen months' imprisonment with hard labour, and twelve strokes with the cat; he was also recommended for expulsion.

Purcell for the appellant, who was not present. The appellant is an illiterate Russian, and his application for leave to appeal has been written at his dictation by one of the prison officials; in it he only applies for leave to appeal against sentence, but I ask for leave to amend the notice to include an appeal against conviction; there are two important points which I wish to raise in favour of such an appeal.

The Court (on the understanding that this exception was not to be made a precedent) gave leave to counsel to proceed as though the notice included an application for leave to appeal against conviction, but after hearing him, refused leave to appeal either against conviction or sentence.

Application dismissed.

Solicitor for Applicant—*C. H. Downes.*

A. L. B. T.

1914
18 *August.*

Ridley J.
Darling J.
Bray J.

ARTHUR JAMES HAVARD.

Recklessness and carelessness are not sufficient to constitute guilty knowledge that property has been stolen.

This was an appeal against conviction and sentence, by leave of the full Court. Appellant was convicted of feloniously receiving stolen property, at the Warwickshire Sessions, holden at Coventry, on the 2nd July, 1914, and was sentenced to nine months' imprisonment with hard labour.

Willes for the appellant, who was present. The appellant was tried with his father, but before the trial the father was tried before the same jury on a charge of receiving stolen ingots which were found in the same place as the stolen property in this case. He was acquitted on that charge, but the evidence in the first trial was re-tendered in order to prove guilty knowledge in the present case. As the ingots were undoubtedly stolen the prosecution was within the wording of the section in giving this evidence if they chose to do so.

[Darling J.: The Chairman ought to have told the jury that, as the father had been acquitted on that charge, the ordinary presumption of law did not arise.]

In any case, it was no evidence against the appellant, who is only twenty-two years old, and was working at a weekly wage in his father's shop. There was, further, no evidence that he ever received the property in this case, or had it in his possession; it was recovered at a railway station, where it was stopped in transit by his father.

The Chairman misdirected the jury by telling them that if a man is reckless and does not care, he is just as guilty as if he received the property, knowing at the time that there was something wrong with it. (He was stopped by the Court.)

Maddocks, for the Crown. I cannot support the direction to the jury, and it appears to be wrong in a material particular.

1914
18 *August.*

ARTHUR JAMES HAVARD.

Ridley J.

RIDLEY J.: This conviction must be quashed. We need not go into the whole story; it is not sufficient to say that if a man is reckless and does not care, he is just as guilty as if he received the property, knowing at the time that there was something wrong with it. We do not agree with that; the proper direction is that the jury must take into consideration all the circumstances in which the goods were received, and must say if the appellant, at the time when he received the goods, knew that they had been stolen.

Conviction quashed.

Solicitor for Appellant—*Walter Cleland,* Coventry.

A. L. B. T.

WINSTON JOHN McCALLUM.

The Court will quash a conviction on an indictment essentially bad.

This was an appeal against conviction, by leave of Bankes J. Appellant was convicted of obtaining goods by false pretences, at the Derby County Sessions, on the 15th July, 1914, and was sentenced to three years' penal servitude.

Neville Anderson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The indictment in this case was bad; it ran as follows:—"That William Winston John McCallum between the third and the twelfth days of May in the year of Our Lord One thousand nine hundred and fourteen unlawfully and knowingly did falsely pretend unto one Frank Mower that he the said Winston John McCallum was named Williams, and that the cost of his board and lodgings on the farm would be paid for by a Mr. McCallum by means of which false pretences the said Winston John McCallum did then unlawfully obtain from the said Frank Mower certain food and lodgings to the value of two pounds with intent to cheat and defraud Whereas in truth and in fact the cost of the board and lodgings in farm work has not been paid by Mr. McCallum or by any other person to the said Frank Mower to the damage of the said Frank Mower and against the form of the Statute in such case made and provided." There is

1914
18 *August.*

WINSTON JOHN MCCALLUM.

Ridley J.
Darling J.
Bray J.

no averment that the appellant's name was not Williams; the pretence that the cost of his board and lodging would be paid by McCallum is not a representation of an existing fact, and therefore is not such a false pretence as will support an indictment, and there is no averment that he knew this pretence was false. (He was stopped by the Court.)

Hole, for the Crown. I cannot support the indictment. The appellant was undefended at the trial, and the indictment was never referred to in the course of the proceedings.

RIDLEY J.: This conviction cannot stand; I am sorry for it, for there is little doubt that the appellant was fraudulent, and if the false pretence alleged had been that McCallum had undertaken to pay for the appellant's board and lodging he might have been convicted. The pretence that his name was Williams might have been a good allegation, but there is no denial in the indictment that his name was Williams. The conviction must be quashed.

Conviction quashed.

A. L. B. T.

BENJAMIN EDWARD ROBINSON.

The normal sentence for rape is five years' penal servitude.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted of rape, at the Lincoln Assizes, on the 22nd June, 1914, before Horridge J., and was sentenced to four years' penal servitude.

Appellant in person.

E. L. Hadfield, for the Crown.

RIDLEY J.: Leave was given in this case to appeal against sentence, but on a full consideration of the matter the Court agrees with the opinion of the judge at the trial, when he said that five years' penal servitude must be taken to be the normal

1914
18 *August.*

BENJAMIN EDWARD ROBINSON.

Ridley J.

sentence in a case of rape. The judge said that the evidence was that the girl in this case was weak physically and mentally; that makes the offence worse. But the judge gave the appellant credit for not suggesting that the girl had consented, and reduced the sentence by one year accordingly. That sentence must stand.

Appeal dismissed.

A. L. B. T.

GEORGE FOWLES.

The fact that the convict has a remanet *to serve may be taken into account in a fresh sentence of penal servitude.*

This was an appeal against sentence, by leave of the full Court. Appellant was convicted of coining, at the Durham Assizes, on the 26th June, 1914, before Sankey J., and was sentenced to ten years' penal servitude.

Huntly Jenkins for the appellant, who was present. The appellant, when nineteen years of age, was convicted of the manslaughter of a policeman, and was sentenced to fifteen years' penal servitude; of that sentence there is still a *remanet* of three years and three hundred and one days to be served. In that case two other men, who were much older than himself, were also convicted. This is his first coining offence. When he was arrested a revolver was found upon him; his explanation of that is that he was terrorised by a man in Birmingham, and carried it for his own protection.

R. Luck, for the Crown. The detective-inspector said that he had never seen such a complete coining apparatus, nor such good counterfeit coins, as were found in the appellant's house at Gateshead. He was arrested in Edinburgh, and gave no explanation then why he was carrying a fully loaded revolver. The explanation that it was on account of a vendetta at Birmingham was only given in the train after he knew that a box containing fifty cartridges had been found in his house. The detective also said that the appellant commenced a career of crime at the age of ten.

1914 .
18 *August.*

GEORGE FOWLES.

Ridley J.

RIDLEY J.: This case was a very bad one; the evidence was very complete, and it is evident that there had been a determined manufacture of false half-crowns. The sentence might well have been ten years if there had been no *remanet* to be served, but in view of that fact we reduce the sentence to seven years' penal servitude.

Sentence reduced.

Solicitor for Appellant—*Harry Wilson.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE LUSH.

DONALD LESBINI.

1914
25 *September.*

Murder.
Mental deficiency short of insanity is not a good defence.

This was an application for leave to appeal against conviction. Appellant was convicted of murder, at the Central Criminal Court, on the 9th September, 1914, before Atkin, J., and was sentenced to death.

E. J. Purchase for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of the murder of a woman named Alice Storey, and the defences raised at the trial were that her death was caused by accident, and, secondly, that the appellant was insane at the time when he shot her. I considered that on the authorities it was not open to me to argue at the trial that the provocation received, which was verbal, was sufficient to reduce the crime to one of manslaughter, but I submit that it is open to me to raise the point here and to ask the Court to re-consider the rule that has been laid down on the question. That rule can be found in the direction given by Keating, J., to the jury in *Welsh*, 11 Cox C. C. 336 (1869): "The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion. When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it—the law does not say that an act of homicide, intentionally committed under the influence of that passion, is

1914
25 *September.*

DONALD LESLINI.

Reading L.C.J.
Avory J.
Lush J.

excused or reduced to manslaughter." I ask the Court to consider whether the provocation must necessarily be such as would influence the mind of a reasonable man before the crime can be reduced to manslaughter.

[The LORD CHIEF JUSTICE: That is a question of fact which was not raised at the trial and was not submitted to the jury. We are not in a position to decide the facts even if you are right in law.]

The facts in this case were before the jury; it is thus distinguishable from *Fitzgibbons*, 7 Cr. App. R. 204 (1912), where the application was grounded on fresh evidence. The real question for the jury to decide in such a case is the *mens rea* of the actual prisoner in the dock. His mental defects may be such that it would be unfair to judge what might be provocation to him by the standard of an ordinary man. *Alexander*, 9 Cr. App. R. 139; 109 L. T. 745; 23 Cox C. C. 604 (1913), is the case most against me, but it is distinguishable because there two hours elapsed between the provocation and the homicide; here the act was immediate. The jury were out of Court for fifty minutes, and then added a strong recommendation to mercy to their verdict, which was obviously grounded on the evidence of the appellant's mental condition.

R. D. Muir and *Boyd*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: This is an application for leave to appeal against a verdict of murder; according to practice, the Court has dealt with it as though it were a final appeal. For the appellant, Mr. Purchase has admitted, as we think he was bound to admit, that he could make no complaint of the summing-up. We think that every point was put to the jury which should have been put to them, and that there was ample evidence on which the jury could find as they did on the two defences put forward.

The appellant entered a shooting gallery in which the deceased was an attendant; she used some language which he understood to be offensive; almost immediately afterwards she dropped her keys, which he picked up; he was handed a revolver for the pur-

pose of shooting at the target, but he pointed it at her, followed her round with it, and fired.

Two defences were put forward at the trial: one, that it was an accident, that his finger caught in the trigger which had a very light pull, as he was following her round with the revolver, but with no intention of shooting her. On the evidence, it was quite clear that the jury could come to the conclusion that it was not an accident. It was in reference to that defence that the argument finds its proper place, that the appellant had very little control of his impulses when he pulled the trigger, and that he was a man of unsatisfactory mental balance, although not insane. The judge told the jury that they could take those facts into consideration. The other defence raised was insanity; there was no real evidence of insanity, and the jury quite properly rejected the defence.

Now before us it is said that we, as a Court of Appeal, ought to come to the conclusion that the test laid down of the provocation that can constitute a defence of manslaughter is too severe; that we should extend the test and alter the verdict in the present case to manslaughter. It is sufficient to say that we see no reason to dissent from the judgment delivered by Darling, J., in *Alexander*, in which case a substantially similar argument was put forward that the Court ought to take into account the mental ability of the prisoners who came before it, and that if the mental ability of one of them is less than that of the other, it ought to avail as a defence for him although it would not be open to the other. We agree with the view stated by Darling, J., and with the principles stated in *Welsh*: "There must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion." This Court is not minded in any degree to weaken the state of the law which makes a man who is not insane responsible for the ordinary consequences of his action. The appeal must be dismissed.

Application dismissed.

A. L. B. T.

1914
25 *September.*

Reading
L.C.J.
Avory J.
Lush J.

ARTHUR HUGHES.

In a proper case the Court will order enquiries to be made for its information.

This was an appeal against sentence by leave of Sankey, J., and an application for leave to call further evidence. Appellant pleaded guilty to unlawful wounding, at the County of London Sessions, on the 18th August, 1914, before the Deputy-Chairman, and was sentenced to twelve months' imprisonment with hard labour.

Appellant in person: The sentence was too severe; the evidence of Handley, the detective, was false.

Mrs. Hughes, called as a witness by the Court, said: I am the appellant's mother; he has been in regular employment since he was fifteen and a half years old, and was in employment at Croydon at the time of the offence. He is twenty-two.

Detective-Sergeant Alexander Handley, called as a witness by the Court, said: I have seen the appellant out at night with gangs of young men for the last three or four years, more especially during the last eighteen months or two years. He used to demand money of people; I have received no complaints of him, but I have of the gang which was known as Hughes's gang. I have never seen him doing anything wrong, but I have cautioned him about standing at street corners; that was several months before this offence. The witness he called at the police-court has been convicted several times. I have had complaints of the appellant; he and two others demanded fourpence from a working man, and threatened him when he refused to give it to them. I have no entry in my book of any complaint. Evans was indicted for wounding Hughes on the occasion in question by shooting at him with a revolver, pleaded guilty, and was bound over.

Appellant: This detective's evidence is not true; I had no need to demand money when I was in good work.

P. T. Blackwell, for the Crown.

1914
25 *September.*

ARTHUR HUGHES.

Reading
L.C.J.
12 *October.*

The LORD CHIEF JUSTICE: The Court will adjourn this case for enquiries.

A. L. B. T.

The LORD CHIEF JUSTICE: This is an appeal by Arthur Hughes against a sentence of twelve months' imprisonment with hard labour for unlawfully wounding one Henry Evans, to which offence he pleaded guilty. He appeals against the sentence only. It appears that the appellant, after being served with drink by Henry Evans, a barman in the employment of a licensed victualler, and after being asked to pay for two drinks which he had ordered, refused to pay for them. The appellant then asked for more drink, but the barman, acting under his master's orders, refused to serve him. The next thing that happened was that the appellant threw a glass measure against the right side of the barman's face. He picked up a glass from the counter, broke it, and threw it with its jagged edge at Evans. Evidence was given after verdict that on a number of occasions he had asked people in the streets for money. On a recent occasion we came to the conclusion that further evidence should be obtained, and the case was adjourned accordingly. The result of the fresh evidence shows that on the whole the appellant was doing his work satisfactorily, but there was nothing to negative the evidence of the police. Having regard to the result of our enquiries we have come to the conclusion that as the glass was deliberately broken, and then used as a weapon against the barman, who was acting under the legitimate orders of his master, the offence was one of a serious character, and in the circumstances the sentence of the Court a proper one. We do not, therefore, see any reason for reducing it, but it will date from conviction. The appeal must be dismissed.

Appeal dismissed.

W. G. H.

BEFORE

MR. JUSTICE COLERIDGE, MR. JUSTICE SCRUTTON, AND MR. JUSTICE SHEARMAN.

1914
19 *October.*

JAMES KELLY.

Sentence mitigated in view of appellant's advanced age.

This was an appeal against sentence by leave of Shearman, J. Appellant was convicted of bestiality, at the Leeds Assizes, on the 14th July, 1914, before Sankey, J., and was sentenced to seven years' penal servitude.

Appellant, who was not present, was not represented by counsel.

Thesiger for the Crown.

LORD COLERIDGE, J.: The judge in this case was evidently influenced by the fact that the appellant had been convicted of a similar crime before, but, on the other hand, this offence was committed in secrecy, so no one else was corrupted by it. For this reason, and on account of the appellant's age—sixty-six—the Court reduces the sentence to one of twelve months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

LOUIS ALLEN FENLON.

Sentence mitigated in view of appellant's youth.

This was an appeal against sentence by leave of Sankey, J. Appellant was convicted of larceny, at the Essex Sessions, on the

16th September, 1914, and was sentenced to seven years' penal servitude.

1914
19 *October.*

LOUIS ALLEN FENLON.

Lord Coleridge J.
Scrutton J.
Shearman J.

St. John Morrow for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant is twenty-two years of age.

C. E. Jones for the Crown.

LORD COLERIDGE, J.: Solely on account of the appellant's youth, we reduce the sentence to one of five years' penal servitude.

Sentence reduced.

A. L. B. T.

SEHAM YOUSRY.

Whether the prosecution should be put to an election of counts is for the discretion of the Court.

On the trial of an indictment for libel a replication may be filed during the hearing.

Counsel ought not to suggest to the jury, by cross-examination or otherwise, the contents of documents which he is not entitled to put in evidence.

Proviso to s. 4 (1) of the Criminal Appeal Act applied.

This was an appeal against conviction on matters involving questions of law. Appellant was convicted of libel, at the Central Criminal Court, on the 15th September, 1914, before Mr. Commissioner Atherley Jones, and was sentenced, after a trial lasting two and a half days, to six months' imprisonment in the second division, and was recommended for expulsion.

Tristram Beresford for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted on an indictment containing two counts: one for publishing a defamatory libel, and the second for publishing a libel with intent to extort money. The prosecutor was a Major Connolly, who had been in the Egyptian army from 1906 to 1910, and while in Egypt he lived with the appellant, who said she was an Egyptian princess; the prosecutor alleged that the appellant had

1914
19 *October.*

SEHAM YOUSRY.

Lord Coleridge J.
Scrutton J.
Shearman J.

been his mistress; she said that she was his wife, a form of marriage having been gone through. In 1910 the prosecutor came to England, where he was followed by the appellant, who wrote him certain letters. She went back to Egypt, but returned again in 1912. The letter which formed the subject of the first count in the indictment was written on the 20th November, 1912, to Mrs. Connolly, a cousin of the prosecutor. It imputed that Major Connolly was the appellant's husband, that he had deserted her, and that he married a fresh wife wherever he went. At the time it was not possible to prove the handwriting of this letter, but in the present year the appellant was charged before the magistrates in Suffolk with threatening Major Connolly, and she then admitted having written this and other letters.

I submitted that the prosecution should be called upon to elect on which count of the indictment they would proceed, but this was refused. The offences were quite distinct, and were committed at different times as far apart as 1910 and 1912; the defence were therefore embarrassed by having to deal with the two charges at once.

[LORD COLERIDGE, J.: That is a matter for the discretion of the judge, and there is no appeal from his decision. *Curtis*, 9 Cr. App. R. 9; 29 T. L. R. 512; 1913.]

Lockett and others, (1914) 2 K. B. 720; 83 L. J. K. B. 1193; 110 L. T. 398; 78 J. P. 196; 30 T. L. R. 233; 9 Cr. App. R. 268, is a later case, and it was there laid down that the material element to be considered is whether the overt acts relied on as proving the different offences charged are in substance the same. See also *Kingston*, 8 East, 41; 9 R. R. 373 (1806). There was no evidence before the magistrates on the second count, so there was no power to send this count before the grand jury. *Coyne*, 69 J. P. 151 (1905).

[LORD COLERIDGE J.: Possibly there was some slight evidence in the letter itself to support the charge of intention to extort money. Also, it would appear from the summing up that the second count was withdrawn from the jury.]

No replication was filed to the plea of justification until in the

1914
19 *October.*

SEHAM YOUSRY.

Lord Coleridge J.
Scrutton J.
Shearman J.

course of the trial the objection was taken that in the absence of any replication, no evidence could be given by the prosecution in rebuttal of the plea. This proposition seems to be supported by a passage from Odgers on Libel and Slander, 5th ed. p. 725, where *De la Porte*, 59 J. P. 617 (1895), is cited, but the case seems hardly to bear out the proposition. However, it is a form which the law requires, and the replication ought to have been filed before the trial began. Despite my objection, leave was given and the replication was there and then drawn up and filed.

Evidence which was inadmissible was given by the prosecution. The prosecutor gave evidence that a report concerning the appellant had been received from the Cairo police; counsel for the prosecution then offered to show me the report; I refused, but the incident was certain to create prejudice in the minds of the jury. Certain certificates of search from the consulate in Egypt and other documents purporting to contradict the appellant's evidence were also tendered by the prosecution, and, although they were not admitted by the judge, the whole of their contents were made known to the jury both by counsel's questions and by long discussions before the jury regarding the admissibility of the documents in evidence. The appellant was asked if in 1907 she had sued a man named Kent for seduction, and whether she had not said he was the father of a child to which she gave birth in 1905; she denied it, and as this matter only went to credit the prosecution should have been bound by her answer.

The judge misdirected the jury by failing to tell them to disregard the documents mentioned, which had not been proved. The test whether a non-direction is a sufficient reason for quashing a conviction is to be found in *Wann*, 107 L. T. 462; 76 J. P. 269; 28 T. L. R. 240; 7 Cr. App. R. 135 (1912), where Lord Alverstone, C.J., said: "We must be satisfied that it is such that it is reasonable and probable that the jury were misled, in which case there might be a miscarriage of justice."

E. Austin Farleigh for the Crown, who was called on only with regard to the evidence of the contents of the documents given in rebuttal by the prosecutor, and as to the reference made by him to documents which were not proved. The evidence of the prosecutor was admissible by virtue of the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 4, which enacts that "if a

1914
19 *October.*

SEHAM YOUSRY.

Lord Coleridge J
Scrutton J.
Shearman J.

witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it." Defendant in cross-examination had denied the allegations I put to her from the documents. All that the appellant says in her plea of justification is put in issue and is part of the subject-matter of the proceedings; the prosecution was therefore entitled to shew that she had made a statement which was inconsistent with her plea of justification.

The documents which have been referred to were admissible in evidence, and should not have been excluded. The police report was admissible because the appellant had herself raised the question of her origin in her plea. It is a common practice for counsel to refer to a document, although the document cannot be put in evidence.

[SCRUTTON, J.: If that is so, the sooner it is stopped the better.]

In a prosecution for libel where a plea of justification is filed, there must be a verdict for the Crown unless all the material allegations of fact in the plea are proved. *Newman,* 1 Dears. C. C. 85; 1 El. & Bl. 268; 3 Car. & K. 252; 22 L. J. Q. B. 156; 17 Jur. 617 (1852). Many allegations in the plea were unsupported by evidence of any kind, nor was there any evidence to shew that the publication was for the public benefit.

Beresford, in reply: The jury must have been prejudiced by the suggestion that the police had made a report about her. The jury might have found for her if they had not been influenced by the documents mentioned.

20 *October.*

LORD COLERIDGE, J.: The appellant in this case was charged with libel, and she filed a plea of justification. The libel substantially meant that Major Connolly was the husband of the appellant, that he had deserted her, that she had had a daughter by him, that he married a wife wherever he went, and that he had married a Soudanese girl and had a daughter of eighteen years of age. The plea of justification set out many allegations of fact, some of which were material and some totally immaterial.

1914
20 *October.*

SEHAM YOUSRY.

Lord Coleridge J.

She alleged that she met Major Connolly in 1907, that she married him in Cairo, and she gave the names of two witnesses of the marriage, and that she had two children, aged four and five years, by him. She did not set out any particulars of the necessary plea that it was to the public benefit that the libel should be published.

The indictment contained two counts: one for defamatory libel, the other for publishing a libel with intent to extort money. The commissioner withdrew the second count from the jury.

The first objection taken is that the prosecution should have been put to its election on these two counts. It is sufficient to say that the demand for election is one which it is in the discretion of the Court to grant or refuse.

The next point taken is that because no replication was filed before the trial the appellant was entitled to be acquitted, on the ground that the plea of justification was not traversed, and must therefore be held to be good. *De la Porte*, which was quoted on this point, does not support it.

A further ground of appeal is misreception of evidence. The appellant was asked whether she did not, in 1907, sue a man named Kent for seduction, and whether he was not the father of her child who was born in 1905. These questions were properly put to her in cross-examination, and she denied them all. The question then arose whether these matters went purely to credit and were not material to the issue, in which case affirmative evidence of the facts which she denied could not be brought. But Major Connolly was called to give rebutting evidence, and to give evidence that she had told him that she had lived with Kent as his mistress in 1905. Apart from other considerations, that evidence was clearly inadmissible; the question whether she had had immoral connection with Kent in 1905 had nothing to do with the issue. Then it was explained that the lady had herself given evidence as to her position, and as to her having been seduced by Major Connolly. It was claimed that these matters were so relevant as to make it an exception to the ordinary law, and to make evidence of statements by her, inconsistent with statements made by her in chief, admissible. It is difficult, and in this case it is not necessary, to decide this point.

Then it was also pointed out that there might have been prejudice in the minds of the jury. See *Makin* v. *Attorney-General for New South Wales*, (1894) A. C. 57; 63 L. J. P. C. 41; 6 R.

1914
20 *October.*

SEHAM YOUSRY.

Lord Coleridge J.

373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148. The question arose thus. The lady was being cross-examined, and counsel for the prosecution held in his hand a piece of paper, and instead of saying, "Look at this piece of paper; do you adhere to your answer?" he described it as a report from the Cairo police as to her origin, and then invited counsel for the defence to look at it, who was sufficiently on his guard not to do so. The effect which it was calculated to produce was, no doubt, that this was a report from the Cairo police so damaging to the appellant that her counsel dare not touch it. Now, that was inadmissible in evidence, and in our judgment that was a wholly wrong method to adopt. Counsel for the prosecution, holding documents in his hands which he cannot put in, has no right to suggest to the jury in any way what they are. The same procedure was adopted in regard to other documents described as being from the consular office in Cairo. They could not be put in, and the jury might easily surmise that these documents were proofs that no such marriage as alleged existed. The documents were flourished, their contents not obscurely indicated; but the judge did warn the jury in this case that they must not take their contents as evidence.

If we thought that the jury might have been influenced by this to such an extent to alter their verdict, we should certainly interfere with it. But we are faced with the fact that here, if a jury did their duty, there could have been no verdict other than that of "Guilty." There were many allegations in the plea which were not supported by an atom of evidence. No evidence or particulars were given that it was for the public benefit that the libel was published. Though no judge can say to a jury, "You must find a verdict of 'Guilty,'" yet we cannot assume that the jury would so have neglected its duty as to say that these defamatory allegations had been proved which were denied on the one hand, and as to the truth of which no evidence was given. In these circumstances, in spite of irregularities, we cannot say that any substantial injustice was done, or that the jury could have altered its verdict. The verdict must therefore stand, but the sentence may run from the date of conviction.

Appeal dismissed.

A. L. B. T.

BEFORE

MR. JUSTICE COLERIDGE, MR. JUSTICE ROWLATT, AND MR. JUSTICE SHEARMAN.

WILLIAM SMITH.

1914
26 *October.*

On an indictment for receiving stolen property, the jury should be directed clearly to the question of the identity of the goods found with those stolen.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted of feloniously receiving stolen property, at the County of London Sessions, on the 11th September, 1914, before the Chairman, and was sentenced on the 24th September to twelve months' imprisonment with hard labour.

J. Newington, who appeared in the uniform of a lieutenant in the East Surrey Regiment, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of feloniously receiving some pairs of trousers which had been stolen from Foster Bros., Ltd., on the 29th August. On the evening of that day he offered trousers for sale at two shops for half a crown the pair. My submission is that there was not sufficient evidence of the identity of the trousers offered for sale with those stolen, and that even if there was such evidence, the Chairman failed to direct the attention of the jury to the question. It is true that the question of identity was not raised by the appellant as it was in *Hill,* 7 Cr. App. R. 250 (1912), but he was undefended, although he had applied for legal aid, and the question should in any case have been put to the jury. In *Leary,* 9 Cr. App. R. 85 (1913), the conviction was quashed, but the question there was whether the prisoner was ever in possession of the stolen goods. It was youths' trousers that were stolen, but there is some evidence that those offered for sale were men's trousers. In

1914
26 *October.*

WILLIAM SMITH.

Lord Coleridge J.
Rowlatt J.
Shearman J.

Dredge, 1 Cox C. C. 235 (1845), where the conviction was quashed, there was more evidence of identity than there is here.

Comyns Carr, for the Crown. There was evidence of identity for the jury. The trousers were stolen on the same day and in the same district as that in which they were offered for sale, and those stolen were about the same in number as those in the possession of the appellant. If that is so, providing the Chairman does not misdirect the jury by assuming the point against him, the conviction should not be quashed unless the question of identity is definitely raised by the defence, as it was in *Hill*. There are no merits in the case; the appellant admitted that he knew the property was stolen, and therefore, even if, strictly speaking, the attention of the jury ought to have been directed to the point, there has been no miscarriage of justice.

LORD COLERIDGE, J.: There seems to be some little doubt what course ought to be adopted in this case. The appellant was charged with stealing and receiving trousers, the property of the prosecutors, and the evidence was this. On the 29th August a bundle of trousers, between eight and twelve in number, youths' tweed trousers, were missed; so there was evidence that such a bundle had been stolen. On the same day the appellant came to one Yates, who had a shop in the same neighbourhood, and asked him to buy some trousers which he produced, about six to eight in number, tied up in a bundle, and with labels on them such as are found on trousers in shops. The appellant admitted as to two pairs that he believed they had been stolen, though he afterwards withdrew that statement. Thereupon it became the duty of the prosecution to prove that the articles which were being dishonestly dealt with by the appellant were those which had been stolen from the prosecutors. The appellant was undefended, but the point that the articles dealt with were not those stolen was never raised.

The Chairman summed up with great brevity; he said: "You have heard that a bundle of trousers was stolen, and you have heard that the prisoner offered a bundle of trousers for sale." If he had said "*that* bundle of trousers," the case would have come within the case of *Hill*. The Court held in *Hill* that as the identity of the wire was disputed at the trial, it became the duty of the judge to ask the jury if they were satisfied that the wire

1914
26 *October.*
WILLIAM SMITH.
Lord Coleridge J.

in the prisoner's possession was the same as the stolen wire. But inasmuch as evidence was given in detail in the present case to connect the trousers with those stolen, the question must have been in the jury's mind. There was evidence in which the jury would very likely have found that they were the same. If the Chairman had given an elaborate summing up dealing with the various points in detail, and had omitted the question of identity, there would be some ground for saying that he had acted on the assumption that the identity was proved. We think that the sentence I have quoted was sufficient indication to the jury what they had to decide, dealing not only with the appellant's confession that he knew the trousers which he was dealing with were stolen, but also the question of the identity of the trousers so dealt with. We do not think, therefore, that the Chairman misdirected the jury. As there are certainly no merits in the case, there has in any case been no substantial miscarriage of justice. There is no reason for interfering with the sentence.

Appeal dismissed.

A. L. B. T.

CHRISTOPHER INGLESON.

Where there has been a mistrial, the Court will award a venire de novo: Baker, 7 *Cr. App. R.* 217 (1912), *followed.*

This was an appeal against conviction by leave of Lush, J. Appellant was convicted of horse-stealing, on the 2nd October, 1914, at the Bradford Borough Sessions, and was sentenced to four months' imprisonment with hard labour.

Appellant, in person.

F. Wood, for the Crown. The appellant pleaded guilty to the indictment and there is no precedent for quashing the conviction in such a case. It is the fact that he handed up a statement to the recorder to the effect that he did not know the horses had been stolen; if it is held that his plea of "guilty" ought not to have been accepted he must be sent back to be tried on the indictment. *Baker,* 28 T. L. R. 363; 7 Cr. App. R. 217 (1912).

1914
26 *October.*

CHRISTOPHER INGLESON.

Lord Coleridge J.

LORD COLERIDGE, J.: In this case there has been a mistake. The appellant was charged with stealing and receiving horses; he pleaded guilty and handed up a statement to the recorder which, if believed, was a complete exculpation; it ended with the words, "I am guilty of taking the horses not knowing that they were stolen." If the recorder read that it was clearly his duty to explain to the prisoner that his proper course was to plead not guilty, and to have such a plea entered. We presume the recorder did not read to the end of the statement. It is most important that a prisoner should not be caught by a phrase like "guilty"; clearly he meant that he had had no felonious intent. In those circumstances it is quite clear that the plea of guilty was wrongly entered and all the proceedings based on that plea are bad. The case must go back for re-hearing, and as the assizes precede the next sessions he must go for trial to the assizes.

Conviction quashed.

A. L. B. T.

BEFORE

MR. JUSTICE BANKES, MR. JUSTICE HORRIDGE, AND MR. JUSTICE ROWLATT.

TOM GILBERT.

1914
2 *November.*

Special verdict substituted by the Court under s. 5 (4) *of the Criminal Appeal Act*, 1907.

This was an application for leave to appeal against conviction. Applicant was convicted of murder, at Aylesbury Assizes, on 13th October, 1914, before Mr. Justice Avory, and sentenced to death.

Sir R. Adkins appeared for the appellant, who was not present.

McCurdy and *Costello* for the Crown.

McCurdy (in the temporary absence of *Adkins*) was asked to state the facts to the Court. Applicant was a foreman platelayer in the employ of the Great Central Railway, and was indicted for the murder of two of his subordinates, Busby and Tucker; he was convicted of the murder of the former. Applicant had reported both the said subordinates for insubordination, and later had reported both because he said he suspected that they intended to pollute his water bottle. An official enquiry was held and the charges dismissed. On the following morning at 6.0 a.m., applicant, with Busby and Tucker, arrived at the platelayer's cabin. At 7.15 a.m. the applicant called at P.-C. Dillow's house and said he had struck Busby and Tucker. P.-C. Dillow went to the cabin and found both dead, their heads having been battered apparently by a pick-shaft. At 8.30, P.-C. Dillow apprehended applicant, who admitted that he had struck both with a pick-shaft. Later, to Sergeant Hill and P.-C. Dillow, he said:

1914
2 *November.*
TOM GILBERT.
Bankes J.
Horridge J.
Rowlatt J.

"They threatened to do me in, so I determined to do them in first." And later, to Superintendent Wootten, "Yes, I did it." Applicant offered to make a statement, was duly cautioned, and made the following statements (*inter alia*), which were read over and signed by him:—

"I have got two men in my section, their names are Charles Busby and Walter Tucker. Yesterday we had an official enquiry through Charles Busby wanting to fight me three times, but I have never struck him. After the enquiry yesterday, I heard Busby say, 'I shall get a revolver.' He said that two or three times, and he has threatened me a good many times that he would do for me, and he also told a man some time ago to put me over. The man was Wyatt, of Smoky Row, Great Kimble. At a quarter past six this morning, Saturday, the 29th August, Charles Busby came into the cabin where I was, and I had some suspicion that he had the revolver which he had spoken about before, and being suspicious I went for him and knocked him over with a pick-shaft. The other man (Tucker) tried to hold me, and I knocked him over also with the same weapon, but I don't know if I killed either. I then went and informed the police that I had knocked them over, but that I didn't know whether I had killed them."

The defence raised was that applicant was insane at the time of the act. It was suggested that he suffered from chronic delusions. It appeared that applicant had three years previously presented a formal report against a subordinate, one Elisha Parker, for rudeness and unpunctuality. Upon enquiry the charge was not sustained. Later applicant had charged Parker with tampering with his tea. Upon enquiry this charge also was dismissed, and the applicant had been transferred. Applicant had also had coffee analysed, thinking that it was being poisoned by another man. Two doctors were called for the defence, one the prison doctor and the other the Medical Superintendent of the County Lunatic Asylum. Both stated that in their opinion the applicant was insane at the time he attacked the deceased man. For the Crown it was contended that the doctors were expressing an opinion as to the applicant's insanity from the medical rather than from the legal aspect of the question.

[HORRIDGE J.: Two defences appear to me to have been pos-

1914
2 *November.*

TOM GILBERT.

Bankes J.
Horridge J.
Rowlatt J.

sible, (1) that the delusion was that he was committing the act in self-defence; (2) that delusions are evidence of general insanity. I think that there was medical evidence in support of both defences.]

The applicant asked for leave to appeal on the ground of misdirection as well as generally. Owing to the course taken by the Court it is not material to refer either to the evidence or to the summing up.

Adkins, for the applicant, was not called upon.

BANKES J.: The Criminal Appeal Act, 1907, s. 5, sub-s. 4, enables the Court, if satisfied that an appellant has been guilty of the act charged against him, but was insane at the time the act was done, to quash the conviction and certify that the prisoner was insane: *Jefferson*, 72 J. P. 467; 24 T. L. R. 877; 1 Cr. App. R. 97 (1908). We are all agreed that the applicant was insane at the time he attacked the deceased man so as not to be responsible according to law for his actions, and we shall apply the above sub-section without expressing any view as to whether or not there has been misdirection at the trial. The sentence will be quashed, applicant to be kept in custody as a criminal lunatic in the same way as if a special verdict had been found.

Sentence quashed: Special verdict substituted.

Solicitors for the Applicant—*R. S. Wood & Co.*, High Wycombe.

W. P.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE COLERIDGE.

1914
9 *November.*

JAMES TURNER.

Severity of sentence.

This was an appeal against sentence, by leave of Rowlatt J. Appellant was convicted of housebreaking, at the Surrey Sessions, on the 21st of October, 1914, and was sentenced to twenty-one years' penal servitude.

Appellant, in person.

H. L. H. Andrews, for the Crown. I cannot support the sentence, and leave the matter to the Court.

DARLING J.: The appellant pleaded guilty to an indictment charging him with housebreaking, and was sentenced by the Chairman of Quarter Sessions to a term of penal servitude of twenty-one years. The appellant is a very bad man, and has been convicted a great number of times. Omitting shorter sentences, he was sentenced in 1897 to three years' penal servitude for housebreaking, in 1902 to five years' penal servitude for housebreaking, in 1906 to seven years' penal servitude and five years' police supervision for housebreaking, in 1914 to four years' penal servitude for an outrage on a small girl, and at the Hertfordshire Quarter Sessions in the same year to five years' penal servitude for housebreaking. So, at the time that he was charged at Surrey he was already serving sentences of four years' and five years' penal servitude to run consecutively, making a term of nine years' penal servitude. The Chairman sentenced him to twenty-one years' penal servitude to run concurrently with the other sentences, that

1914
9 *November.*

JAMES TURNER.

Darling J.

is a further period of twelve years at the end of the nine years he already had to serve. We think that that was not a proper way to deal with the case, and having considered it we reduce the sentence to one of seventeen years' penal servitude. If the appellant had received certain notices we should have reduced the sentence of penal servitude to seven years, and sentenced him to ten years' preventive detention to follow the penal servitude. As we are unable to do that, the sentence formally must be seventeen years' penal servitude, but we impose that sentence desiring that seven of it shall run concurrently with the sentences now being served, and that as to the remaining ten years the Home Secretary should use the powers he has under the Prevention of Crime Act, 1908, to convert the sentence of penal servitude into one of preventive detention. We indicate to the Home Secretary that he will be acting in accordance with our views if he does so convert it. That will enable the appellant to get his period of confinement shortened if he decides to reform.

Sentence reduced.

A. L. B. T.

MORRIS GOLDSTEIN.

Statutory corroboration under the Criminal Law Amendment Act, 48 & 49 Vict. c. 69, must be of the offence charged, and is not afforded by evidence of another crime committed by the defendant.

A sentence of imprisonment with hard labour consecutive on another such sentence should not be passed.

This was an appeal against conviction and sentences, by leave of Rowlatt J. Appellant was convicted of attempted procuration, at the Central Criminal Court, on the 21st October, 1914, before Mr. Commissioner Rentoul, and was sentenced to two years' imprisonment with hard labour. Appellant had also been sentenced to a further term of twelve months' imprisonment with hard labour, consecutive to the sentence of two years, as an incorrigible rogue, by the Deputy-Chairman, at the County of London Sessions, on the 22nd October, 1914.

1914
9 *November.*
MORRIS GOLDSTEIN.
Reading L.C.J.
Darling J.
Lord Coleridge J.

H. W. Rowsell for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was brought up for sentence at the County of London Sessions as an incorrigible rogue, on the 20th October, the actual offence being a breach of an expulsion order. That matter was ordered to stand over until after the appellant's trial at the Central Criminal Court, and the result of the two sentences is that the appellant has to serve three years' imprisonment with hard labour.

[The LORD CHIEF JUSTICE: The Court will not allow that sentence to stand.]

On the conviction for attempted procuration there was no corroboration whatever of the evidence of the prosecutrix. There was a charge of rape made against the appellant by the prosecutrix, of which the Commissioner told the jury there was no evidence against the appellant; the medical and other evidence given was corroboration on that charge only.

T. Landers, for the Crown. There was corroboration of several of the allegations made by the prosecutrix, but the evidence was not sufficient to afford material corroboration in support of the charge that the appellant tried to make her a prostitute.

The LORD CHIEF JUSTICE: The appellant was convicted of attempting to procure a girl to become a common prostitute within the King's dominions under s. 2 (1) of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), but there is a proviso to that section, namely, "Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused." Now, in this case it is sufficient to say that, having heard all that can be urged by Mr. Landers on behalf of the Crown on the point, we are of opinion that there was no corroborative evidence which implicated the accused; in other words, that the proviso has not been complied with. Mr. Landers admits quite properly that there was no such evidence. In order that men may be protected from a charge of this character being made against them by a woman without corroboration, the law provides that there

1914
9 *November.*

MORRIS GOLDSTEIN.

Reading L.C.J.

must be corroboration of some material particular implicating the accused. Now here it is said that the charge of attempted procuration rested on the evidence of the girl alone. It is admitted that there was no corroboration of any material particular implicating the accused, but there were other matters on which the girl gave evidence on which there was corroboration. One of these matters amounted to the commission of a crime by the appellant if the jury accepted her evidence, but not of the crime with which he was charged; it is suggested that that was sufficient corroboration to satisfy the statute. The proposition has only to be stated to be refuted. It is clear that it is intended that the corroborative evidence should implicate the accused in respect of the offence charged; when that fails it is wholly immaterial that there is corroboration of other portions of her evidence. It follows that this conviction must be quashed, and with it the sentence of two years' imprisonment with hard labour. The Court is not intending to lay down any new proposition of law; it is only applying the law of the statute to the particular facts of this case.

Another charge was brought against the appellant in another Court, namely, of being an incorrigible rogue, and for that he was sentenced to twelve months' imprisonment with hard labour consecutive upon a sentence of two years' hard labour; it is difficult for this Court to understand how that sentence could be passed, the result of it being that the appellant would have to serve three consecutive years of imprisonment with hard labour. This Court thinks that when a prisoner is sentenced to two years' hard labour no consecutive sentence of further imprisonment with hard labour ought to be imposed. If we had not quashed the other conviction we should have felt bound to quash this sentence, but, in view of the fact that the conviction and sentence of two years' hard labour must be quashed, the conviction as an incorrigible rogue stands, and also the sentence of twelve months' hard labour, and that will be the effect of the judgment of this Court.

Conviction quashed.

A. L. B. T.

1914
9 *November.*

Reading
L.C.J.
Darling J.
Lord
Coleridge J.

GEORGE NEWTON SPENCER.

On the trial of an indictment for inciting to an offence against the Trading with the Enemy Act, 4 & 5 Geo. 5, c. 87, in the absence of any evidence that the defendant proposed to obtain a licence under par. 8 of the Royal Proclamation contemplated in s. 1 (2) thereof, the jury are entitled to convict.

This was an appeal against conviction and sentence, by leave of Rowlatt J. Appellant was convicted of inciting to trade with the enemy at the Central Criminal Court, on the 14th October, 1914, before Rowlatt J., and was sentenced to eighteen months' imprisonment.

Eustace Fulton for the appellant, who was present. The appellant was employed as a clerk by a German firm, and he arrived in this country on the 22nd September to make certain propositions on behalf of his employers to Messrs. Houlder Bros. That firm held mortgages on three German ships which were interned in neutral ports, and the suggestion was that these ships should be transferred to an English firm, the mortgages cancelled, and £15,000 paid to the German firm through Rotterdam. The question is whether in putting forward this proposition the appellant was suggesting that anything illegal should be done. The transaction could be carried out quite properly if a licence was obtained. There was no evidence that the appellant suggested that it should be done without a licence, and I submit that where a transaction can be carried out either in a legal or illegal manner the Court is not entitled to assume that the intention was to carry it out illegally. The prohibition against trading with the enemy is to be found in paragraph 5 (9) of the Trading with the Enemy Proclamation (No. 2) of the 9th September [Statutory Rules and Orders, 1914, No. 1376; *London Gazette*, September 9, 1914; *Edinburgh Gazette*, September 11, 1914; *Dublin Gazette*, September 10, 1914], issued in accordance with s. 1 (2) of 4 & 5 Geo. 5, c. 8, the Trading with the Enemy Act, 1914, but paragraph 8 of the same Proclamation makes it legal to trade where a licence to do so has been obtained.

[The Lord Chief Justice: Is it not a question of fact, rather than of law, that is being put to us? Was not the jury entitled to

1914
9 *November.*

GEORGE NEWTON SPENCER.

Reading L.C.J.
Darling J.
Lord Coleridge J.

come to the conclusion that the intention was to trade with the enemy quite apart from a licence ?]

Only if there was evidence on which they could so find. Further, the jury was not properly directed on the point; the judge all through his summing up assumed that the intention was to carry out the transaction without getting a licence, which was the very question the jury had to decide. He also said that it was on the appellant to prove that he had intended to obtain a licence.

The LORD CHIEF JUSTICE: The appellant was convicted of soliciting and inciting persons unlawfully to trade with the enemy, contrary to the Trading with the Enemy Act, 1914, and he was sentenced to eighteen months' imprisonment. The case comes before us as an appeal against conviction and sentence. The appellant was commissioned by his principals in Germany to make an offer in this country which, if accepted, would have resulted in three German-owned vessels then interned in neutral ports, being sold to the English firm of Houlder Brothers, and in the payment of £15,000 to the German firm. The transaction was to be carried out by a remittance of the money to a firm in Holland, and then by them to a solicitor in Germany who was to act as trustee for the vendor of the ships. There is no doubt about these facts, and if the proposals had been carried out, they would undoubtedly have amounted to trading with the enemy in direct contravention of the Proclamation of the 9th September, 1914, made in pursuance of the statute.

But it is said that, although it is an offence to trade with the enemy it is not an offence if a licence is obtained; reliance is placed on paragraph 8 of the Proclamation, which is:—"Nothing in this Proclamation shall be taken to prohibit anything which shall be expressly permitted by Our licence, or by the licence given on Our behalf by a Secretary of State, or the Board of Trade, whether such licences be especially granted to individuals or be announced as applying to classes of persons," and it is urged by Mr. Fulton on behalf of the appellant that this proposal was not made with the intention of its being carried out without a licence, but was a legitimate proposal put forward on behalf of his principals which could be carried out if a licence was granted.

1914
9 *November.*

GEORGE NEWTON SPENCER.

Reading L.C.J.

Paragraph 8 of the Proclamation does not enact new law, but states for the information of the public what can be done with permission; that is very old law The whole question in this case was whether this man was putting forward a proposal which was inciting Messrs. Houlder Brothers unlawfully to trade with the enemy. The question in dispute is whether in the proposal made, or in the words used, there was any evidence of an intention to commit the offence which was forbidden by the Proclamation. The question is not one of law but of fact, depending on the inferences of fact to be drawn from the evidence of the conversations. The matter was put to the jury very fairly by Rowlatt J., and not unfavourably to the appellant.

If the case was put properly to them, the jury were entitled to come to a conclusion on the facts that the proposal was not made with the intention that Messrs. Houlder Brothers should only fall in with it if a licence was obtained. The jury were entitled to find that there was no intention of making a proposal conditional upon the obtaining of a licence, and that therefore the offence was committed. The Court is of opinion that there is no reason for interfering with the verdict or for criticising the summing up. We would only point out that if the argument is right that the jury must find in such a case that the proposal made was for a contract to be entered into with a licence, the effect would be not only to destroy the value of the Proclamation, but to run contrary to the common law of the kingdom. The Court, therefore, comes to the conclusion that the appeal against conviction must be dismissed.

On the question of sentence, it is very necessary that it should be brought home to the public in this country, and more especially to British subjects, that this is an offence. and an offence of a serious kind, and detrimental to the interests of this kingdom, since it is intended to assist, and does assist, the King's enemies. We cannot say that the sentence was excessive.

Appeal dismissed.

Solicitor for the Appellant—*S. Myers.*

A. L. B. T.

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE AVORY AND MR. JUSTICE LUSH.

JAMES WILLIAM RHODES.

1914
16 *November.*

On an appeal on the ground that the appellant pleaded guilty by mistake, the Court will satisfy itself on the facts whether he really did not understand the effect of his plea.

This was an appeal against conviction and sentence, by leave of Rowlatt J. Appellant was convicted of larceny, at the Blackburn Borough Sessions, on the 23rd of October, 1914, and was sentenced to twelve months' imprisonment with hard labour.

Appellant in person. I pleaded guilty to taking books out of a house that was on fire, but I took them out at the request of a man who said he was the foreman.

R. Oliver for the Crown. The appellant handed in a statement to the Recorder which, if true, would have gone a good way to establish his innocence. The Court, however, is entitled to look into the man's record before allowing the matter to be re-opened. The appellant has been convicted seven times already for larceny and must have understood the charge against him. His statement must be taken to be a plea in mitigation, since the opening words were, "I am sorry for what I have done," and in his notice of appeal he says, "My time is too long for what I have done." The foreman gave evidence at the police court and stated that he did not give the appellant authority to remove the books, and he was not cross-examined.

A. T. LAWRENCE J.: In this case the appellant was charged with larceny of books of account, stamps, pliers and other things which he took from a house that was on fire. On arraignment he

1914
16 *November.*

JAMES WILLIAM RHODES.

Lawrence J.

pleaded guilty and handed in a written statement; the question is whether that statement shews clearly that the appellant in pleading guilty did so under a mistake. If that is so there is authority for saying that the case should be remitted for trial. [*Ingleson*, above, p. 21.] We think that the rule in such cases must be that the Court must be satisfied that there really has been a mistake, and when we look at the document that was handed in we do not think there was any mistake. We agree with Mr. Oliver that it was really a plea in mitigation. It begins: "I am sorry for what I have done." If the appellant took the things out of the house to save them from destruction he performed a laudable act. He says: "I did not mean to take the books away," and it may be that he intended to draw a distinction between the books and the other property, and to say that he did not mean to take away the books, which would not have been easily convertible into cash. There is not sufficient evidence to satisfy the Court that there has been any mistake, so the appeal must be dismissed. The sentence imposed was not excessive.

Appeal dismissed.

A. L. B. T.

HARRY WILDE AND CORNELIUS JUKES *alias* WEST.

Severity of sentence.

These were appeals against sentence, by leave of Rowlatt J. Appellants were convicted of shop-breaking, at the Leicester County Sessions, on the 20th October, 1914; Wilde was sentenced to two years' imprisonment with hard labour, and Jukes to three years' penal servitude, consecutive to a sentence of seven years' penal servitude passed on the 19th October.

Neither of the appellants were present, nor were they represented by counsel.

Disney for the Crown. The crime of which the appellants were convicted was evidently carefully planned. Jukes has been convicted several times before, and the Birmingham police say that he is one of the most skilful burglars in that district. Wilde

1914
16 *November.*

HARRY WILDE AND CORNELIUS JUKES *alias* WEST.

Lawrence J.
Avory J.
Lush J.

has never been convicted of any serious offence before. He made a living as a vocalist at public-houses and at the seaside; he was apparently on his beam ends when he made Jukes's acquaintance. He was not arrested until four months after the offence, and he had in the meantime enlisted; he was said to be doing extremely well as a soldier and was the life of the regiment.

A. T. LAWRENCE J.: The appellants pleaded guilty to two indictments for shop-breaking; Wilde was sentenced to two years' imprisonment with hard labour, and Jukes to three years' penal servitude to commence on the expiration of a sentence of seven years' penal servitude passed on the previous day. As Mr. Disney has very properly told us the cases of the two men were very different; Wilde is a first offender, Jukes is an old offender, and while we much dislike interfering with sentences there are some cases in which we feel bound to do so, and this is one of them. We think that the sentences are so clearly excessive that we must reduce them. Wilde will be adequately punished by a sentence of six months' imprisonment with hard labour, and Jukes by one of three years' penal servitude, on each indictment, Jukes's sentence to run concurrently with his sentence of seven years' penal servitude.

Sentences reduced.

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE BRAY, AND MR. JUSTICE LUSH.

1914
23 *November.*

ANNIE SMITH.

Pregnancy does not diminish the extent of the provocation which in homicide will justify a verdict of manslaughter.

This was an application for leave to appeal against conviction. Applicant was convicted of murder, at the Nottingham Assizes, on the 31st October, 1914, before Avory J , and was sentenced to death. A jury of matrons was empanelled, and the prisoner was found to be pregnant.

Dietrichsen for the applicant, who was present. In the early morning of September 3, the prisoner hit a child, aged two and a half years, over the head with the heavy end of a long-handled broom, owing to some action on the part of the child which had annoyed her. The notice of appeal had been drawn by the woman herself, and she asked for leave to appeal on the grounds that several witnesses gave false evidence, and that several witnesses varied in their evidence. The notice itself contained no real ground for appeal, and nothing had taken place at the trial which would in any way bear out the grounds stated in the prisoner's notice, but he had a submission to make on another point with the permission of the Court. In summing up, Avory J. did not sufficiently put to the jury, in the manner in which he had tried to argue, the question of the result which the prisoner's condition might have on the verdict. A witness, namely, Florence Hill, was called, who stated that she knew from the prisoner's husband that the prisoner, at the time she committed the crime, was pregnant. There was, in fact, no doubt that she was seven months in the family way, as after the trial she was found to be so by the jury of matrons empanelled for that purpose.

1914
23 *November.*

ANNIE SMITH.

Ridley J.
Bray J.
Lush J.

[BRAY J.: What has pregnancy got to do with it?]

A pregnant woman, in regard to matters of mental attitude, is not quite normal.

[BRAY J.: Short of insanity, a pregnant woman knows what she is doing.]

Yes, that is so.

[RIDLEY J.: Because something has irritated her, that does not entitle her to take steps to kill the child.]

I can say nothing on the grounds for appeal put forward by the woman herself, and the only point is whether her abnormal condition would make the act of provocation on the part of the child sufficient to reduce the crime from murder to manslaughter.

[RIDLEY J.: It is difficult to suggest how provocation could be given by a child of two and a half years.]

That is the only point I have to make.

Sir Ryland Adkins and Parry for the Crown, were not called upon.

RIDLEY J.: Mr. Dietrichsen has put forward all that could be suggested, but it is impossible to see any reason why the Court should interfere. The grounds put forward will not avail. Mr. Dietrichsen admits the question was entirely one for the jury. He adds a ground to which we are not able to attach any importance, namely, pregnancy. It is impossible to see how that bears upon this question, namely, whether applicant had any intention of killing the child. There is no case for us to interfere, the matter is solely one for the Home Secretary.

Appeal dismissed.

Solicitor for the Applicant—*R. A. Young*, Nottingham.

L. W. J. C.

1914
23 *November.*

Ridley J.
Bray J.
Lush J.

WILLIAM CONDUIT.

When a trial has been postponed to a later assize, a proper notice given to an alleged habitual criminal holds good.

This was an application for leave to appeal against conviction. The appellant was convicted of possessing and uttering counterfeit coin, and afterwards of being a habitual criminal, at the Leicester Assizes, on the 24th October, 1914, before Avory J., and was sentenced to 3 years' penal servitude and 7 years' preventive detention.

No counsel appeared.

The prisoner was to have been tried at the summer assizes, but owing to the fact that counsel, in opening, had mentioned a previous conviction, the judge discharged the jury, and as other persons in Court might have heard it, postponed the trial until the autumn assizes.

Bray J.: The applicant appeals upon a certain point of law which he raised before Avory J., but which the learned judge overruled; the first question is whether the Court can deal summarily with this point of law as being without any substance. If it is without substance it is clear that it can. (See s. 15 (2) of the Criminal Appeal Act.) The point was whether proper notice had been given to the prisoner and to the officer of the Court. In deciding against the applicant, Avory J. said: "The statute (in s. 10 (4) b) provides that the charge of being an habitual criminal shall not be inserted in an indictment unless not less than seven days' notice has been given to the proper officer of the Court by which the offender is to be tried and to the offender, that it is intended to insert such a charge. In this case it is admitted that seven days' notice, before the assizes held for this county in June, was given both to the clerk of assize and to the prisoner himself. The assizes in June were the Court at which it was intended to insert the charge in the indictment, and this is a mere provision of a condition precedent to the insertion of the charge in the indictment, that this notice shall be given. The notice having been given before the charge was in-

1914
23 *November.*

WILLIAM CONDUIT.

Bray J.

serted in the indictment, in my opinion it has been properly inserted, and it has been found a true bill by the Grand Jury, and it remains on the files of this Court to be tried, and I think it must be tried." The Court agrees with Avory J., and considers that the point of law is without substance and dismisses the appeal.

Application dismissed.

L. W. J. C.

JOHN BURLISON.

Whether on the trial of an indictment for obtaining by false pretences evidence of exactly similar conduct by the defendant at a date subsequent to that charged is admissible as evidence of identity, quære.

Rodley, 9 *Cr. Ap. R.* 69 (1913), *remarked on.*

Severity of sentence.

This was an appeal against a conviction on a point of law. The appellant was convicted on the 27th of October, at Stoke-on-Trent Borough Sessions, before the Recorder, on an indictment charging him with obtaining money by false pretences, and was sentenced to twelve months' imprisonment in the second division. The appellant also applied for leave to appeal against the sentence.

S. A. H. Burne, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The indictment against the appellant charged him with having on the 13th August, 1914, made false representations to a firm of the name of Hepworth & Company, at Longton, Staffordshire, to the effect that he was an inspector sent down from the head office of the firm in Leeds, with authority to examine the stock of the Longton branch, and obtain cash for expenses. At the trial the sole defence for the appellant was the question of identity, and witnesses were called to prove that the appellant was elsewhere at the time when he was alleged to have been in Messrs. Hepworth's shop. Evidence was called by the prosecution to prove that, on the 20th August, the appellant went to the shop of Messrs. Freeman, Hardy & Lewis, boot sellers, in Tunstall, and made representations similar to those which he was alleged to have made to Messrs. Hepworth & Sons in Longton. The evidence was objected to, but was admitted by the Recorder after some hesitation. I refer the Court to the principle

1914
23 *November.*

JOHN BURLISON.

Ridley J.
Bray J.
Lush J.

established in *Makin* v. *Attorney-General for New South Wales,* [1894] A. C. 57 (above, p. 17); and also to the rule laid down by this Court in *Rodley*, [1913] 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 465; 58 S. J. 51; 29 T. L. R. 700; 9 Cr. App. R. 69; as shewing that this evidence, tendered by the prosecution at the trial, was not admissible, and that the jury may have been influenced by it. In his summing up, the Recorder treated this evidence of a subsequent transaction as corroborating the evidence of identity. This, it is submitted, was misdirection on the part of the Recorder.

[BRAY J.: The handwriting is very strong evidence of identity.]

It is impossible to say whether the jury would have been satisfied on the question of handwriting apart from the evidence given about the subsequent transaction.

[LUSH J.: There is the question as to the receipts alleged to have been given by the appellant. Also, can it be said that there has been a miscarriage of justice when the appellant, after verdict, admitted the justice of it?]

The fact that appellant, after verdict, was willing to have two other indictments taken into account, is not an admission that he was rightly convicted.

Roland Oliver, for the Crown.

LUSH J.: The appellant in this case was convicted on an indictment which charged him with obtaining the sum of £1 by false pretences. The point raised by counsel on his behalf is that, at the trial, certain evidence was wrongly admitted which may have had the effect of influencing the jury in arriving at their verdict. It is clear that, on the 13th of August last, someone went to the establishment of Messrs. Hepworth & Sons, who carry on the business of hatters and tailors at Longton, in Staffordshire, and represented that he had been sent from the headquarters of the firm in Leeds for the purpose of inspecting the books and stock at Longton, and with authority to obtain cash for the payment of expenses. This man took some silver out of Messrs. Hepworth's till and gave a receipt in the name of Rawson. The prosecution

1914
23 *November.*

JOHN BURLISON.

Lush J.

at the trial tendered evidence to shew that, on the 20th August, the same person went to another shop in Tunstall and made representations to the same effect, giving the name of Rawson. The appellant admitted that he went to the shop at Tunstall on August 20th, but denied that he gave the name of Rawson, or that he made the alleged statements. It is true that the Recorder, in his summing up, treated the evidence of what took place on the 20th August as material to the charge made against the appellant. We have been referred to the case of *Rodley*, as shewing that the jury may have been influenced by this evidence which it is said was wrongly admitted. In our judgment it is not necessary for us to say whether the evidence relating to the 20th August, was, or was not, admissible, as in any case the Court is satisfied that no miscarriage of justice has taken place. The considered judgment of Bankes J., in the case referred to, was limited to the facts of the particular case, and was not intended to be exhaustive. In the present case the evidence of the handwriting of the appellant was, in our opinion, conclusive against him, and there is also the record of what the appellant said and did after the verdict of guilty was brought in by the jury. The appeal must therefore be dismissed. With regard to the sentence there was nothing known against the appellant previous to this offence, and the sentence of twelve months in the second division will be reduced to one of four months in the second division, to date from the conviction.

Sentence reduced.

R. F. B.

BETSEY TAYLOR.

It is a misdirection to tell the jury that unless they believe that the witnesses for the prosecution have committed perjury, they must find a verdict of guilty, when there is another possible explanation of the facts.

This was an appeal against conviction. The prisoner was convicted on the 23rd October, at the Lindsey Quarter Sessions, of obtaining £1 by false pretences from Wm. Spencer Watson, and was sentenced to six months' hard labour.

On behalf of the prosecution it was alleged that the prisoner

1914
23 *November.*

BETSEY TAYLOR.

Ridley J.
Bray J.
Lush J.

came to Mr. Watson's farm and obtained £1 from him, stating that she had left her purse at home at Scott's farm and would be too late for the shops if she returned for it. Both Mr. Watson and his wife identified the prisoner. For the defence it was alleged that Mr. and Mrs. Watson were mistaken as to the identity of the prisoner, and evidence was called to shew that the prisoner was in Gainsborough at the time when she was alleged to have been at Mr. Watson's farm. It was admitted by the defence that Mr. Watson had been defrauded by someone.

Bainbridge, for the appellant (who was not present), was not required to argue.

Anderson, for the Crown, said he could not attempt to justify the remarks of the Deputy-Chairman as to the witnesses for the Crown committing perjury, but submitted that there had been no miscarriage of justice, as the jury could not have been misled by the summing up, both counsel for the prosecution and the defence dealing solely with the question whether there had been an honest mistake on Mr. and Mrs. Watson's part or not. Perjury on the part of the witnesses was not suggested by either side.

BRAY J.: The conviction in this case cannot stand, as the Deputy-Chairman never properly left the case for the defence to the jury. The effect of what he said in his summing up was that, unless the jury came to the conclusion that all the witnesses for the prosecution had come to the Court to commit perjury, and out of spite against the prisoner, they must find the prisoner guilty. There were, of course, other possible explanations, and the evidence did not warrant such a direction. The Deputy-Chairman had no right to use the words he did. The appeal must be allowed.

Conviction quashed.

Solicitor for the Appellant—*L. C. Iveson*, Gainsborough.

L. W. J. C.

HENRY MORRIS.

1914
23 *November*.

Ridley J.
Bray J.
Lush J.

Severity of sentence.

In passing sentence on a prisoner who has often been previously convicted, regard should be had to the last sentence inflicted on him.

Appeal against sentence by leave of Rowlatt J.

The appellant, having pleaded guilty, was convicted for the larceny of a coat, value 19*s*., and sentenced to five years' penal servitude on the 24th October, 1914, at the Middlesex Sessions, before the Deputy-Chairman. Evidence was given at the trial that the appellant had been convicted on nine previous occasions. Eight of the consequent terms of imprisonment were of varying lengths, amounting to a total of about five years. On the remaining occasion, in 1903, he was found guilty of assaulting a boy with intent to commit an unnatural offence. When he came up for sentence in that instance there was another charge outstanding against him of assaulting a girl of eight years of age. He requested that he should be dealt with for both offences, and was sentenced to ten years' penal servitude. He was released on licence in March, 1914, but this licence was subsequently revoked, owing to his having failed to report himself as required by the terms of the licence. He was again released on licence in May, 1914. He obtained employment and worked at Willesden for three months, and at Kensington for a fortnight. He was then convicted for larceny, and sentenced to three months' imprisonment, his licence being again revoked in consequence. At the time of committing the offence, in connection with which this appeal was made, he had enlisted in His Majesty's army.

The appellant, in person.

Sydenham Jones, for the Crown.

Bray J. (after stating the facts as above set out): I do not think that this sentence can be maintained. There is no doubt that the case comes very near to those in which it is right that a severe punishment should be inflicted. The appellant's last offence

1914
23 *November.*

HENRY MORRIS.

Bray J.

was, however, a comparatively trivial one, and we do not think that a sentence of penal servitude was necessary. The Court think that, in all the circumstances of this case, the sentence appealed against was too severe, and that it should be reduced to one of fifteen months' imprisonment with hard labour.

Sentence reduced.

G. F. L. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, MR. JUSTICE AVORY, MR. JUSTICE LUSH, AND MR. JUSTICE ATKIN.

ISAAC SCHAMA AND JACOB ABRAMOVITCH.

1914
30 *November.*

On indictments for receiving recently stolen property with guilty knowledge, the onus *of satisfying the jury of the defendant's guilt always rests on the prosecution; it never changes. When the prosecution has proved the possession by the defendant and that the goods had been recently stolen, the jury should be directed that they* may, *not that they must, in the absence of any reasonable explanation, find a verdict of guilty. If an explanation is given which may be true, it is for them to find, on the whole evidence, guilty or not guilty. If they think that the explanation may reasonably be true, though they are not convinced that it is, they should acquit.*

These were appeals against conviction by leave of the full Court. Appellants were convicted of feloniously receiving stolen goods, at the Central Criminal Court, on the 16th October, 1914, before Mr. Commissioner Rentoul. Schama was sentenced to nine, and Abramovitch to twelve months' imprisonment in the second division. These appeals came before the Court, consisting of A. T. Lawrence, Avory and Lush JJ., on the 16th November, when judgment was reserved. On the 23rd November it was ordered that the matter should be re-argued before five judges.

Travers Humphreys for appellant Schama, who was present The appellants were convicted with another prisoner named Harris of feloniously receiving sixteen packing cases containing underclothes of the value of £320. The prosecution proved the theft of these cases at 5 p.m. on the 24th September, and that the prisoners were in possession of the goods at 7.30 p.m. on the same day when Schama bought most of the goods from Abramovitch

1914
30 *November.*

ISAAC SCHAMA AND JACOB ABRAMOVITCH.

Reading L.C.J.
Bray J.
Avory J.
Lush J.
Atkin J.

for £240 or £245. There was also evidence that Schama was preparing to purchase these goods before they were stolen, as he drew a considerable sum from his bank on the same afternoon, which must have been done before 4 p.m. The two appellants made a statement on arrest which differed in one respect only, and in that respect the prosecution admitted that Schama's version was the correct one.

The defence of Schama was that he was dealing in the class of goods in which he had been accustomed to deal, and that he had been buying such goods from Abramovitch for fifteen years. His character was vouched for by the police, who said that he had carried on a respectable business for nineteen years. He stated that he had bought similar goods by samples from Abramovitch a little time before, and this was corroborated by a receipt which was produced; also, that on the 24th September, at two o'clock, Abramovitch came to him and said he would have more goods to sell him that day similar to the previous lot, and that that was how he came to draw the money from his bank that afternoon. I must admit that on the facts as proved, and assuming a proper direction, there was evidence on which the jury could convict, but my submission is that the judge misdirected the jury on several points, more especially as to the *onus* of proof in a case of receiving such as this. On this question the judge said: "It is the duty of the prosecution to prove the case against the prisoners. The burden of proof is on them up to a point, that is to say, they have to prove that the goods were stolen, and the stolen goods were in the hands of those people; but then the prisoners have to give an account of how the goods came into their possession, and stolen goods, as the learned counsel just said, might be in the possession of any of us, but at the same time we would be able in most cases to give a completely satisfactory explanation of how we got them, and an explanation which would satisfy a jury"; and later: "As I said from the beginning, the prosecution have to prove that these men were dealing with stolen goods. That the prosecution have done. The prisoners are then put to explain how it came that they were dealing with these stolen goods, and to give an explanation that will satisfy twelve reasonable men. If you think that these three, or any one of the three, has given an explanation of how he was honestly dealing with these goods, and if you are prepared

to accept that explanation, by all means accept it; but if you think you cannot accept it in the case of one, two, or three, then, gentlemen, you will find each of them guilty." That is a misdirection in law, because it assumes that as soon as the appellants are proved to have been in the possession of goods which had been recently stolen, it is for them to prove their innocence, and that is contrary to the decision in *Stoddart*, 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612; 2 Cr. App. R. 241 (1909).

[LUSH J.: The point was also decided in *Hagan*, 9 Cr. App. R. 25 (1913).]

An explanation which may be true should be put carefully to the jury: *Field*, 4 Cr. App. R. 190 (1910).

[BRAY J.: In *Stoddart*, to which judgment I was a party, we meant to decide that the *onus* of proof never changes. A jury ought never to be told that they *must* convict the prisoner because no explanation has been given by him.]

Not only was the principle of law decided in *Stoddart* never put to the jury, but a wrong principle was put to them; the words in the summing up, "an explanation that will satisfy you" must mean one which the jury would believe to be true.

Purcell for appellant Abramovitch, who was present. I have nothing to add to what Mr. Travers Humphreys has said.

Roome for the Crown. I submit that the summing up was substantially accurate and sufficient. If the jury think an explanation is false they are entitled to convict the prisoner; if they are left in doubt they are entitled either to convict or acquit. If the account given by the prisoner is unreasonable or improbable on the face of it, the *onus* of proving its truth lies on him: *Crowhurst*, 1 Car. & K. 370 (1844); *Harmer*, 2 Cox C. C. 487 (1848). In both those cases the direction given to the jury was very similar to that given here. In *Powell*, 3 Cr. App. R. 1 (1909), Lord Alverstone C. J. said: "The possession of recently stolen property throws on the possessor the *onus* of shewing that he got it honestly."

1914
30 *November.*

ISAAC SCHAMA AND JACOB ABRAMOVITCH.

Reading L.C.J.
Bray J.
Avory J.
Lush J.
Atkin J.

[The LORD CHIEF JUSTICE: That remark was not necessary to the decision in that case. No doubt the words were used with some qualification, which has not been reported.*

Whether a person found in possession of stolen goods gives a reasonable explanation of his possession is a question for the jury. *Richard Smith*, 5 Cr. App. R. 77 (1910). In that case the prisoner gave an explanation that was quite reasonable, but still the jury convicted. Even if the judge misdirected the jury, there has been no miscarriage of justice, and therefore the Court should act under the proviso to s. 4 (1) of the Criminal Appeal Act and refuse to quash the conviction.

The LORD CHIEF JUSTICE: The appellants, Schama and Abramovitch, were convicted on an indictment which charged them with another prisoner named Harris with receiving goods, well knowing them to have been stolen. The jury convicted both appellants, and they now appeal against that conviction. On the 24th September a carman employed at Hay's Wharf received goods consigned to Solomon Stern, Limited, by the Great Eastern Railway into the van which he drove. At 5 p.m. he drove it to the premises of one of the appellants. Harris sold the goods obtained from the carman to Abramovitch, and Abramovitch at the same place and time sold them to Schama for £240. Abramovitch paid £213 to Harris; Harris had paid £110, or possibly £190, and we will assume that the latter figure is the correct one. There is no doubt that the value of the goods was £320; they were consigned from Germany and Austria before the war began, and had probably appreciated in value. They were sold the next day to Davidson, of the firm of Langleben & Co., for £322, some of the goods still being left in Schama's hands.

It is clear that on those facts, and on a proper direction, there was sufficient evidence on which the jury, if so minded, could convict the appellants. It is admitted by counsel for both appellants that there was evidence to go to the jury. The case really resolves itself into one question, whether the judge gave a proper direction to the jury before they arrived at their decision. Cases of this kind have come frequently before this Court complaining

* So Darling J. in *Harris Carter*, 7 Cr. App. R. at 193 (1912).

1914
30 *November*.

ISAAC SCHAMA AND JACOB ABRAMOVITCH.

Reading L.C.J.

of language used by the judge at the trial in pointing out the principle of law for the guidance of the jury. It is essential in cases of this character that there should be a careful and proper direction.

Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That *onus* never changes, it always rests on the prosecution. That is the law; the Court is not pronouncing new law, but is merely re-stating it, and it is hoped that this re-statement may be of assistance to those who preside at the trial of such cases.

We have to decide whether the judge has given a direction to the jury in accordance with the principle of law just stated. We must not be too critical in dealing with the summing up of a judge after a lengthy trial and speeches by counsel. Nevertheless, the Court must be satisfied that when the jury find the prisoner guilty they have applied the right principle of law to the facts before them. It is said by Mr. Travers Humphreys that the judge made it appear to the jury that, once it was proved that the goods in the possession of the appellants had been recently stolen, the burden of proof shifted to the defendants, and that they had to satisfy the jury, either of the reasonableness of their explanation, or of their honesty in dealing with the stolen goods. When one looks at the passages criticised, it does appear that the judge never put to the jury that if they were satisfied that the explanation given by the appellants might reasonably be true, the Crown had not established beyond reasonable doubt the guilt of the prisoners. This Court, looking not minutely, but broadly, at the summing up, cannot find any statement of that principle of law, and the jury may have come to the conclusion that once they were

BIBL. LONDIN UNIV.

1914
30 *November.*
ISAAC SCHAMA AND JACOB ABRAMOVITCH.
Reading L.C.J.

satisfied that the appellants were in possession of the property, the burden of proof rested on them of proving the truth of their explanation. That is the effect of the words used, and we cannot, therefore, say that the judge gave a proper direction.

Then it is said by counsel for the Crown that the proviso to s. 4 (1) of the Criminal Appeal Act should be applied, on the ground that there has been no miscarriage of justice. This Court has frequently said that, where there has been a misdirection in law, it will not interfere if it is satisfied that the jury, on a proper direction in law, must have found the same verdict; but if the Court comes to the conclusion that the jury might, but not that they must, have returned the same verdict, the Court must give effect to its view of the summing up. Dealing with the facts proved with regard to these two men, the Court is unable to say that the jury, if properly directed, must have convicted them, and the Court is, therefore, of opinion that the convictions must be quashed.

Convictions quashed.

Solicitors for the Appellants—*Osborn & Osborn.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LUSH AND MR. JUSTICE ATKIN.

FREDERICK GRAHAM GORDON McCULLOCH.

1914
30 *November.*

Mitigation of sentence in view of lengthy detention before trial.

This was an appeal against sentence by leave of Bray J. Appellant was convicted of feloniously stealing a postal packet, at the Newcastle Assizes, on the 4th November, 1914, before Mr. Justice Shearman, and was sentenced to twelve months' imprisonment with hard labour.

Appellant in person.

J. A. R. Cairns for the Crown.

The LORD CHIEF JUSTICE: In this case we have had the advantage of a report from the judge who tried the case. It appears that at the trial he was unaware that the appellant had already been in prison for six or seven weeks. Having regard to the judge's report, and also to the fact that this is the first conviction recorded against the appellant, we think the sentence should be reduced to one of ten months' imprisonment in the second division.

Sentence reduced.

R F B

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE LUSH, AND MR. JUSTICE ATKIN.

1914
7 *December.*

SAM DAVIS.

In a proper case the Court will grant an applicant a transcript of the shorthand note of the proceedings at the trial, free of charge, under Criminal Appeal Rule 39c.

Application for leave to appeal against conviction and sentence and to call further evidence.

The applicant was convicted on October 29th, 1914, at the Central Criminal Court, before the Recorder, of receiving stolen goods. He was sentenced to twelve months' imprisonment with hard labour, and was recommended for expulsion.

E. Abinger for the applicant. I was not present at the trial, which lasted for five days. I have not been supplied by the solicitor instructing me with a transcript of the shorthand note of the proceedings, as the applicant was unable to pay the sum required for the same, namely, £20. It is very difficult for me to conduct the case without a transcript, and I must, therefore, throw myself on the indulgence of the Court.

DARLING J.: If you would be seriously embarrassed in making this application without the transcript, we have decided to grant you an order for a free copy.

Solicitor for the Appellant—*Daniel Medcalf.*

G. F. L. B.

GEORGE HENRY WOOD.

1914
7 December.

Darling J.
Lush J.
Atkin J.

Severity of sentence.

Appeal against sentence.

The appellant was convicted on the 11th November, 1914, at the Stafford Assizes, before Ridley J., of forging and obtaining money on forged instruments, and was sentenced to three years' penal servitude. The appellant, who was not present, pleaded guilty at the trial to three indictments which charged him with forgery, and three indictments which charged him with obtaining sums of money by means of forged instruments. The appellant was an insurance agent of an Approved Society under the National Insurance Act, 1911, and he had adopted the practice of forging claims for sick pay, which would be payable by the approved society to the assured. To do this he had to forge the name of the assured to the note under which the claim for sick pay was made; the name of the doctor to the medical certificate; the name of the assured to the final declaration; the name of the doctor to the final medical certificate; and the name of the assured to the receipt for the money. He was then in a position to obtain from time to time the sums which were claimed in respect of sick pay, and he retained those sums. The only sums in respect of which he pleaded guilty were three in number, but there were a number of other cases in which he had gone through the same systematic course of forgery, and the total amount that he had procured was stated to be between £60 and £70. His explanation was that he obtained this money for the purpose of retaining part of it as premiums, because the number of members on his books was falling off and he wished to conceal that fact from the insurance company.

Roland Oliver for the Crown.

ATKIN J.: I think there is no evidence before us to support the prisoner's story. This is a very serious case, but at the same time the appellant was a man of good character. He was only twenty-three years of age, and there were no previous convictions against him. He was sentenced to three years' penal

1914
7 December.

GEORGE HENRY WOOD.

Atkin J.

servitude. The Court is of opinion that in all the circumstances this sentence was too severe. It is a serious offence, but we should have thought that a proper sentence would be eighteen months' imprisonment with hard labour. The man had already been in prison for some three months at the time of his conviction and, therefore, we think it right to reduce the sentence to one of fifteen months' imprisonment with hard labour to run from the date of the conviction.

Sentence reduced.

G. F. L. B.

FREDERICK ARTHUR WILLIAM KETTERIDGE.

If, after the judge has charged a jury, a juror separates himself from his fellows without being under the control of the Court, there is a mistrial, and this Court will not consider whether the appellant was prejudiced by the juror's action or not.

Appeal against conviction.

The appellant was indicted on the 6th November, 1914, at the Chelmsford Assizes, before A. T. Lawrence J., for rape, and was sentenced to six months' imprisonment with hard labour. At the trial, on the conclusion of the learned judge's summing up, the jury consulted for several minutes without leaving the jury-box, and then stated that they wished to retire. A bailiff was duly sworn and the jury were given into his custody. After an absence of forty-three minutes the jury returned with a verdict of guilty of attempted rape, and recommended the prisoner to mercy.

It appeared subsequently, however, that, on the retirement of the jury, one of the jurymen on leaving the Court separated himself from the others, left the precincts of the Court for a period of from ten to fifteen minutes, and then rejoined the other jurymen in the retiring room and participated in their verdict when they returned to the Court. The matter was reported by the bailiff to the Clerk of Assize, and he mentioned it privately to the learned judge, who

took no steps with regard to it. In consequence, the prisoner and his counsel knew nothing of the occurrence until two days later. There was nothing to shew that anything improper had taken place, such as the discussion of the case with any outside party. The juror who had so absented himself, in reply to a communication from the Clerk of Assize, wrote a letter to the Registrar of the Court of Criminal Appeal with reference to his conduct.

1914
7 *December.*

FREDERICK ARTHUR WILLIAM KETTERIDGE

Darling J.
Lush J.
Atkin J.

C. E. Jones for the appellant, who was not present. When once the jury is charged, they are not in any circumstances allowed to separate. If they do it is an irregularity which utterly vitiates the trial: *O'Connell and Others*, 1 Cox C. C. 410 (1845). Sometimes it is necessary that they should, but that is only in the case of illness, as in *R.* v. *Crippen*, [1911] 1 K. B. 149; 80 L. J. K. B. 290; 103 L. T. 705; 22 Cox C. C. 289; 75 J. P. 141; 27 T. L. R. 69; 5 Cr. App. R. 255, where the separation was during the course of the trial, which was for murder, where practically the same rule applies.

[LUSH J. referred to *Ward*, 17 L. T. 220; 16 W. R. 281; 10 Cox C. C. 573 (1867); C. C. R.]

In *Willmont*, 10 Cr. App. R. 173 (1914), the irregularity complained of by the appellant was materially the same as here, and the Court quashed the conviction. Lord Reading C.J., in his judgment, said: "It was sought to put in evidence the testimony of three jurymen, but the Court came to the conclusion that such evidence was inadmissible, and that it could not receive evidence from a juryman of what took place." The letter, therefore, which the juror, who absented himself in this case, has written to the Registrar of the Court of Criminal Appeal cannot be read to prove that there was no actual interference with that juryman. The course that should have been taken here was that the matter should have been mentioned in open Court, so that the prisoner or his counsel would have an opportunity of questioning the jury or demanding a new jury.

[DARLING J. referred to the Juries Detention Act, 1897, 60 Vict. c. 18.]

1914
7 *December.*

FREDERICK ARTHUR WILLIAM KETTERIDGE.

Darling J.
Lush J.
Atkin J.

Rolund Burrows for the Crown, admitted the absence of the juror. The mere separation of one juror from the others does not in itself vitiate the trial. There must be something further, such as prejudice to the prisoner, of which there is no evidence in this case: *O'Neill*, 3 Craw. & Dix. 146 (1843).

The Court quashed the conviction, but postponed judgment

14 *December.*

LUSH J. read the following judgment. The learned judge stated the facts, and proceeded: At the hearing of the appeal counsel, on behalf of the appellant, submitted that the trial was, in the circumstances, abortive, and that the conviction should be quashed. The Court after argument took that view and ordered the conviction to be quashed and the appellant to be discharged from custody, but as the case involved matters of some importance, we thought it better to state our reasons in writing. Mr. Burrows, who appeared for the prosecution, contended that although the juror did what was irregular in separating from his colleagues and exposed himself to the risk of having a punishment imposed upon him for his contempt of Court, the Court should not, in the absence of evidence that he had communicated with any other person, or that the appellant had been prejudiced by his action, treat the trial as abortive, jurors now being allowed to separate during the trial of a prisoner on a charge of felony such as this. He cited *R.* v. *Kinnear*, 2 Barn. & Ald. 462 (1819), and *R.* v. *O'Neill*, 3 Cr. & Dix. 146. In the first of these cases the offence charged was a misdemeanour, and the judge had not summed up. Therefore, that decision does not assist us in the present case. In *O'Neill*, which was an Irish case, and the decision was merely that of a Court of first instance, there are *dicta* which appear to shew that the fact that the prisoner had been prejudiced by the juror conversing with other persons was material, but the case of *R.* v. *Fowler*, 4 Barn. & Ald. 273 (1821), which was cited does not appear to us to justify that contention. In our opinion it is not necessary or relevant to consider whether the irregularity has in fact prejudiced the prisoner. We refused to consider an explanatory statement which we were told had been made by the juror, which would clearly not be admissible evidence. If a juror, after the judge has summed up, in any criminal trial separates himself from his colleagues and not being under the

1914
14 *December.*

FREDERICK ARTHUR WILLIAM KETTERIDGE.

Lush J.

control of the Court converses, or is in a position to converse with other persons, it is an irregularity, which in the opinion of the Court renders the whole proceedings abortive, and the only course open to the Court is to discharge the jury and commence the proceedings afresh. This view was adopted by the Court in *Ward* (above). That such an act on the part of a juror is irregular, and could not be sanctioned by the Court itself, was recognised by the Legislature in the Juries Detention Act, 1897, 60 Vict. c. 18. We, accordingly, quashed the conviction.

It is, of course, open to the Crown to recommence the proceedings. It is for the Crown to consider whether to adopt that course or not.

Conviction quashed.

G. F. L. B.

Solicitors for the Appellant—*Houghton, Fry & Young,* Southend.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE LUSH, AND MR. JUSTICE ATKIN

1914
14 *December.*

GEORGE WALTER NORMAN.

On an indictment with counts charging the obtaining by false pretences both credit and chattels, the prosecution should elect for which offence it will first proceed.

Appeal against conviction and sentence.

Appellant (who was present) was convicted, on October 24th, 1914, before the Deputy-Chairman, at the Kingston Sessions, of obtaining a mare by false pretences, and of obtaining credit by false pretences, and was sentenced to five years' penal servitude. The indictment on which the appellant was charged contained six counts, one of which charged him with obtaining credit by false pretences or fraud other than false pretences, while the fifth charged him with obtaining a mare from one Clarice Ashton Cross by false pretences with intent to defraud, and the sixth with obtaining credit by false pretences in respect of the purchase of the same mare. The appellant pleaded not guilty to these charges. In his summing up the Deputy-Chairman failed to direct the jury as to the difference between the offence of obtaining a chattel by false pretences and that of obtaining credit by false pretences, or to indicate any particular evidence pointing to one offence or the other, or to state what proof the prosecution would have to produce according as they charged the appellant with the one or the other. The jury found appellant guilty on one count (or, possibly, on one series of offences), but the Deputy-Chairman said, "That is guilty on the whole indictment," and he was sentenced to five years' penal servitude (*a*).

(*a*) Cf. *David Johnston*, 9 Cr. App. R. 262 (1913).

1914
14 *December.*

GEORGE WALTER NORMAN.

Darling J.
Lush J.
Atkin J.

H. W. Rowsell, for the appellant (under s. 10 of the Criminal Appeal Act, 1907), was not called upon.

G. Cecil Whiteley, for the Crown. Appellant was defended by counsel. On the charge of obtaining the mare by false pretences, it was never contended at the trial that in the event of the jury being satisfied that the false pretences were, in fact, made, credit, and not the mare, was obtained by such pretences. There was, therefore, no necessity for the Deputy-Chairman to differentiate between the two offences in his summing up to the jury. The conviction on the charge of obtaining the mare on false pretences was a right conviction, as there was ample evidence in support of it.

LUSH J.: The appellant was convicted of obtaining a mare by false pretences, and also of obtaining credit from two persons by false pretences, and was sentenced to five years' penal servitude. He obtained leave to appeal against both the conviction and the sentence. The only charge which was made against him of obtaining a chattel by false pretences was that of obtaining the mare from Mrs. Ashton Cross. The other two charges were confined to obtaining credit by false pretences. There were other counts in the indictment, but they were for obtaining credit by fraud other than false pretences; the Debtors Act, 1869, making it an offence to obtain credit by false pretences or any other fraud. There was evidence against the appellant with regard to the transaction by which he obtained the mare, and it was very necessary that the jury should be directed on the two ways in which it might be viewed. They should have been directed on what constituted the offence of obtaining a chattel by false pretences, and on what constituted the offence of obtaining credit by false pretences. Unfortunately, there is not a word in the summing up on that view of the case. Mr. Whiteley very frankly admits that the Deputy-Chairman did not give the jury any direction at all on the difference between the two offences, nor indicate any particular evidence pointing to the one offence or the other. We do not say that there was not evidence here upon which the appellant might have been convicted of obtaining the mare by false pretences, but there was, as I have said, no direction whatever on what constituted the two offences, or on what the

1914
14 *December.*

GEORGE WALTER NORMAN.

Lush J.

prosecution would have to prove on the one charge or the other. It was a matter of very great importance that the difference between the two offences should be made clear to the jury, because different evidence was admissible in the two cases. Upon that ground we think that we ought to treat the verdict as a verdict on the lesser charge, namely, that of obtaining credit by false pretences, and to substitute for the sentence of five years' penal servitude one of twelve months' imprisonment with hard labour This is the maximum sentence for the offence of obtaining credit by false pretences, but we think it just in view of the sentence passed by the learned Deputy-Chairman at the trial.

We desire to add this. In cases of this kind where there are several counts and several transactions, the counts charging the prisoner with obtaining a chattel by false pretences, and the counts charging him with obtaining credit by false pretences, should be dealt with separately. Evidence which is admissible on the charge of obtaining credit by false pretences may not be admissible on the charge of obtaining chattels by false pretences, and when all the evidence on both charges is before the jury, it is very difficult for them to separate it when they come to consider their verdict. It is, therefore, important that the prosecution should elect for which offence the prisoner shall be tried, and that he should not be tried for both at the same time. If the prosecution fail on the counts charging the prisoner with the one offence, they can, of course, then proceed on those charging him with the other.

Sentence reduced.

G. F. L. B.

GEORGE EVANS.

In a proper case the Court will reduce a sentence to that which the trial judge had desired to impose under a condition.

Appeal against sentence.

The appellant (who was present) was convicted, at the Stafford Assizes, on November 14th, 1914, before Ridley J. of writing and publishing defamatory libels, and was sentenced to six months' imprisonment in the second division. It appeared that he had

1914
14 *December.*

GEORGE EVANS.

Darling J.
Lush J.
Atkin J.

written a number of postcards to a woman with whom he had formerly been on good terms charging her, in effect, with offences which would render her liable to imprisonment. At the trial the learned judge said that if the appellant would enter into recognisances not to continue the persecution of this woman he would be willing to accept them instead of imposing any sentence. The appellant, however, was not willing to consent to this course. The jury in giving their verdict expressed their doubt as to the appellant's sanity.

H. du Parcq for the appellant.

S. A. H. Burne for the Crown.

The appellant said that he could find several persons to join him in a bond that he would behave himself properly in future.

DARLING J.: At the trial the prisoner refused to enter into recognisances not to persecute this woman any more in the future. He has since stated that he did not then understand what was meant, but that he thought that his doing so would entail some renunciation of his civil rights and interference with his control over his goods. The real meaning of what was suggested has been explained to him since the trial, and he is now willing to enter into recognisances. We have come to the conclusion that we will allow this appeal if he will enter into a bond to be of good behaviour for two years, the bond to be binding on himself in £50, and on two sureties in £25 each. Each of these sureties must be approved by the police of Stafford, the district from which he comes, and forty-eight hours' notice must be given to the prosecution of the sureties proposed. These sureties will enter into recognisances before justices of the peace, and when they have done so the appellant will enter into his recognisances before the governor of the gaol. He can then be discharged.

Sentence reduced.

Solicitor for Appellant—*H. G. Kenyon* for *G. Pearsall Locker*, Birmingham.

G. F. L. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, MR. JUSTICE BANKES, MR. JUSTICE LUSH, AND MR. JUSTICE ATKIN.

NICHOLAUS EMIL HERMANN AHLERS. 1914 18 *December*.

Upon the trial of an indictment under the Treason Act, 1351 (25 Edward III. st. 5, c. 2), the intention and the purpose of the defendant in doing the overt acts proved are material to the issue.

This was an appeal against conviction on the certificate of Shearman J., who tried the case. Appellant was convicted of high treason, at the Durham Assizes, on the 9th December, 1914, and was sentenced to death.

Tindal Atkinson, K.C. (with him *Mundahl*), for the appellant, who was not present. The appellant was indicted under the 25 Edw. III., st. 5, c. 2, the Treason Act, 1351, with having, on the 5th August, 1914, at Sunderland, and at divers other times after that day, with force of arms unlawfully, maliciously, and traitorously adhered to, aided, and comforted the King's enemies. The first overt act alleged against him in the indictment was that of endeavouring to procure Otto William Martin, a German subject, to go to Germany and serve in the German army, and the second, publishing a letter to Martin with intent to procure him to go to Germany and serve. There were similar charges with regard to Leonard Körfer, and as further overt acts he was charged with endeavouring to procure Johann Biemann to go to Germany to serve, and with paying him money for that purpose, and with similar acts with regard to eighteen German subjects whose names were unknown. All these acts were alleged to have occurred on the 5th August, except the pay-

1914
18 *December.*

NICHOLAUS EMIL HERMANN AHLERS.

Reading L.C.J.
Darling J.
Bankes J.
Lush J.
Atkin J.

ment of money to Biemann, which was said to have taken place on the 6th August.

The appellant was a German by birth, and his age is fifty. For the last thirty years he has resided, and carried on business, in England. In August, 1905, he took out letters of naturalisation in this country, and at about the same time he was appointed German consul in Sunderland. It will be remembered that on Saturday, the 1st August, it was known that Germany had declared war with Russia, and on Monday, the 3rd August, that Germany had declared war with France; there was then considerable doubt what action would be taken by England. It was known on the 4th August that Belgium had been approached by Germany to allow German troops to go through Belgium, and that the request had been refused. On that day, Sir Edward Goschen, the British Ambassador in Germany, had an interview with the German Chancellor, at which he asked that Germany should proceed no further with the invasion of Belgium. This request was declined, and Sir Edward Goschen asked for, and received, his passports. A supplement to the *London Gazette* was issued at some time on the 5th August containing a proclamation to the effect that England was at war with Germany from 11 p.m. on the 4th August. A copy of the *Gazette* was produced at the trial, and it is not disputed that that was sufficient evidence of the fact that war was declared from that hour At 3 p.m. on Wednesday, the 5th August, the Prime Minister, in the House of Commons, made the formal announcement that this country was at war with Germany.

It was proved that before the 5th August a number of Germans reported themselves to the appellant; a list of them was produced, with remarks on it in the appellant's writing, and it was stated by him or his clerk that most of them left England before the 5th August, up to which date everything he did could be lawfully done. The judge said that he did not think that knowledge that war had broken out was a material element, but that he would leave the case to the jury on the assumption that it was necessary; and the first ground of appeal is that there was no proof or evidence in fact, nor any sufficient evidence upon which the jury were entitled to infer knowledge on the part of the appellant before the afternoon of August 5th. On the evening of the 4th August

1914
18 *December.*

NICHOLAUS EMIL HERMANN AHLERS.

Reading L.C.J.
Darling J.
Bankes J.
Lush J.
Atkin J.

the appellant received this telegram from the German consul-general in London: "All able men from 17 to 45 try to find their way to Germany. Send no one here. Aid needy ones." That telegram was despatched at 6 p.m., but was not received until 11 p.m. It was his duty as German consul to obey these instructions, Germany being at war with Russia and France. On the next morning he saw an announcement in the *Daily Mail* that war had been declared by Germany against England at 7 p.m. on the previous night. This announcement was incorrect; and he said he did not become convinced that war had broken out until the afternoon, and all the acts referred to in the various counts in the indictment were done by him before then. In the case of Biemann, who obtained the money for his passage on the 6th August, it was only as a result of an authorisation signed and given him by the appellant on the 4th August. The judge should have held there was no evidence proper to go to the jury on this question.

The further grounds which the appellant has put forward in his notice of appeal are as follows:—

"2. At the said time I was not aware that the acts I was doing were unlawful, and I did in fact believe them to be permissible on the following amongst other grounds:—

"(a) I submit I was entitled after 11 p.m. on Tuesday, the 4th August, to continue doing acts which I might lawfully do before that hour until I was made aware of an official declaration of war.

"(b) I submit that, in accordance with the established practice of nations for many centuries and the rules of International Laws as affirmed by an Order in Council and an Order thereunder made by the Home Secretary and published on the 5th August, alien enemies are entitled or accustomed to be allowed a certain period of grace within which they may lawfully leave this realm and return to their own country.

"3. In any case, whether the two preceding submissions are or are not well founded, I honestly believed them to be correct, and in doing the acts alleged against me I did them in the honest belief that they were lawful, and did not do them traitorously. Fairly considered, the evidence shews clearly that I acted openly, innocently, and without any traitorous intent."

The Aliens Restriction Act, 1914, 4 & 5 Geo. V. c. 12, was passed on the 5th August, and by s. 10 of an Order

1914
18 *December*

NICHOLAUS EMIL HERMANN AHLERS.

Reading L.C.J.
Darling J.
Bankes J.
Lush J.
Atkin J.

made thereunder it was provided that from a date to be fixed by a Secretary of State alien enemies should not embark from an approved port except with a permit from a Secretary of State. Rules and other Orders in Council were issued under this statute, and among others a "Notice to Shipping Companies, Masters of Ships, and all others whom it may concern." The notice stated that on and after the 6th August certain specified ports would be approved ports; and further on said: "Alien enemies, *i.e.*, at the date of this notice subjects of the German Empire, will be allowed to land or to embark at an Approved Port only when furnished with a permit from a Secretary of State, and will not be allowed to land or embark at a Prohibited Port; provided that Alien Enemies may embark at Approved Ports without such permits before August 11th." This was issued on the 5th August by order of the Home Secretary. I submit, therefore, that the appellant was entitled to assist alien enemies to leave up to the 11th August, even though he knew a state of war existed. There is nothing in the notice restricting its operation to those who were not liable to military service. I cannot say that the appellant saw the order, but he said in evidence that he was under the impression that days of grace were allowed within which an alien enemy might leave the country; the notice shews that the view he took was justified.

I made the submission that it could not be treason to the Crown to do the very thing which the Crown has given permission to be done, but the judge ruled against me. In his summing up the judge said: "The Order in Council, I venture to think, has nothing to do with this case. To say, 'I thought I was entitled even if war was declared to send these people out,' would not be a defence. What is known as a guilty mind only means that a man must not intentionally do the act which is forbidden by the law. I cannot help thinking it is a little ill-advised that a man who comes here in one breath to say, 'By midday I ceased doing anything,' should say in the same breath, 'At the same time, I thought the law allowed me to do it.' I think the best thing you can do is to dismiss that from your mind altogether. I can hardly think it would be seriously pressed as a defence, because it was hardly likely, if he thought he could do it, he would be stopped by an Order in Council." (He was stopped by the Court upon this point.)

1914
18 *December.*

NICHOLAUS EMIL HERMANN AHLERS.

Reading L.C.J.
Darling J.
Bankes J.
Lush J.
Atkins J.

Sir Stanley Buckmaster, S.-G. (with him *Scott-Fox, K.C.*, *Branson*, and *Coutts Trotter*), for the Crown. The Order of the Home Secretary did not, and could not, make it lawful for an English subject to pick out men in the German army who were in this country and send them back to Germany to fight against our forces. The judge was, therefore, right in ruling that the Order had nothing to do with the case. The Aliens Restriction Act gave power to impose restrictions and conditions on aliens, and there is nothing in it which makes what was a crime before an innocent act. An Order in Council cannot alter the common law unless the statute empowers the Secretary of State to do so. The Order did not give alien enemies the right to leave the country for a purpose which was unlawful by the laws of this country, and some of the men sent were in fact stopped at Folkestone. It cannot be said that the Order in Council misled the appellant, because it is admitted that he never saw it. His own evidence shews that he knew that it would be a criminal act to do the acts he did after he became aware that war had broken out between England and Germany; he said he took the telegram that he received from the German consul in London as confirmation that these two countries had made up their differences; and that if he had believed the statement in the *Daily Mail* it would have altered his actions. If the appellant had seen the Order and had been misled by it, he would still have been guilty of high treason. Even if the Order did allow armed Germans to leave the country, it would not be relevant to consider it, as the Order in Council could not overrule the statute. Nor would it be relevant to consider it because the appellant said that he thought by International Law a period was allowed in which alien enemies might leave the country. The summing up was therefore right.

Tindal Atkinson, K.C. Two questions arise: one, whether the Order made the acts lawful; and the other, the effect the Order has on the question of guilty knowledge. If the appellant had a belief that what he did was sanctioned by law, the Order was a matter which the jury might properly take into consideration. Such a custom has existed for many years. See 1913 edition of Pitt-Cobbett's Leading Cases on International Law, Part II., p. 58, under the heading of " Enemy Persons Found within the Terri-

1914
18 *December.*

NICHOLAUS EMIL HERMANN AHLERS.

Reading L.C. J.
Darling J.
Bankes J.
Lush J.
Atkins J.

tory of a Belligerent: the Right of Withdrawal"; and Hall's International Law, 6th ed. (1909), p. 385.

The LORD CHIEF JUSTICE: The appellant was convicted of high treason by adhering to, aiding, and comforting the King's enemies, and he was sentenced to death. The judge granted a certificate that this was a fit case to be dealt with by this Court, both on questions of fact and of law.

The appellant is a German-born subject, who has resided in England for thirty years. In 1905 he was naturalised in this country under the Act of 1870, and became a British subject, with all the rights, liberties, and obligations of a British subject. He acted as German consul at Sunderland. On the 1st August Germany declared war against Russia, on the 3rd August she declared war against France; on the 4th August an ultimatum was issued by England to Germany, and as a result, at 11 p.m. on the 4th August, a state of war began between England and Germany. That state of war was announced in the *London Gazette* of the 5th August, and that is evidence of the fact, which is not in contest. During the first four days of August, the appellant, in his capacity of German consul, had taken steps to assist German subjects to return to their own country. That was in pursuance of his duty. He was strictly entitled, according to the law of England, to assist them to return although their purpose was to perform military duties in Germany. On the 5th August, in the morning, he read in a daily newspaper that war had been declared between England and Germany at 7 p.m. on the previous day. On the 5th August, according to the evidence, which is not in dispute, he undoubtedly did advise or assist two persons who are mentioned in the indictment, Martin and Körfer, to return to Germany. It must be borne in mind that at the moment, according to the appellant's statement, although he had read that a state of war existed, he did not believe it; he still thought that action might be taken by Germany which would prevent war. On the 5th August he continued the policy which he had been pursuing for the preceding few days of assisting German subjects of military age to return to Germany. I should add that there was possibly some evidence that on the morning of the 6th August he did an act of the same character in his capacity as

1914
18 *December.*

NICHOLAUS EMIL HERMANN AHLERS.

Reading L.C.J.

German consul. He was arrested on the 6th August, and was eventually charged with high treason.

His defence in the main consisted of a denial of knowledge that a state of war existed between this country and Germany at the time when he did the acts on the 5th August and, possibly, on the morning of the 6th. It is clear that he did know it some time on the 5th, but the evidence as to what happened on the 6th was not satisfactory, because the acts with which he was charged on that day were acts done in pursuance of orders given by the appellant before the 6th August. He had received on the evening of the 4th August a telegram from the consul-general which, he thought, justified him in continuing to act on the 5th as he had acted on the 4th. It also must be borne in mind that the acts were official acts and were quite openly done.

On the 5th August an Act of Parliament was passed called the Aliens Restriction Act, 1914, and on the same day an Order in Council was issued in pursuance of that statute. There was also issued on that day a notice by the Home Secretary, in pursuance of the Order in Council, whereby he limited the time for the departure of alien enemies from this country to the period between that date and the 11th August. Now, it is true that the appellant knew nothing of the statute, the Order in Council, or the notice, but he stated in evidence that he believed there was a rule of International Law which gave a margin of time in which subjects of a country with which we were at war might leave these shores, and that notwithstanding that they might be going to perform military service.

During the trial an argument was addressed by Mr. Tindal Atkinson to the Judge based upon the statute, the Order in Council and the notice. He urged that, although the documents were not evidence that the facts had come before the appellant, they were proof of the reasonableness of his belief that there was a margin of time allowed, and therefore that he had no traitorous intention or purpose. The appellant had said that his belief was assisted by the instructions he received from the consul-general. Having regard to our opinion on another point, it is sufficient to say that the Order in Council and the notice do lend some colour to the reasonableness of this belief.

Counsel for the appellant further submitted that the jury

1914
18 *December*.

NICHOLAUS EMIL HERMANN AHLERS.

Reading L.C.J.

ought to be told that not the mere acts of the prisoner, but his intention and purpose in doing them ought to be considered by them. It cannot be doubted that his intention and purpose were material to the issue before the jury. Unless the jury were satisfied that his intention was evil, and that the appellant was intending to aid and comfort the King's enemies, and did these acts with this object, they could not find him guilty. He was charged, in the words of the indictment, with "contriving and with all his strength intending to aid and assist the enemies of our Lord the King against our said Lord the King and his subjects heretofore during the said war . . . . and with force of arms, unlawfully, maliciously and traitorously was adhering to, aiding and comforting the German Emperor and his subjects against our Lord the King." . . . . The defence put forward was that he was acting openly in his capacity of consul, and in the belief that he was not only entitled, but that he was in duty bound, at the material dates, to assist German subjects to return to their own country, and that his intention was not in any way to injure this country's interests, but merely to carry out his duty. The judge dealt most carefully with the facts in his summing up to the jury, and certainly treated not unkindly the evidence given by the appellant; but, unfortunately, his attention was centred mainly on the contention that the appellant, in fact, did not know that war had begun, and the learned judge did not put to the jury the alternative views as to the purpose and intention of the prisoner to which I have called attention. He did this out of consideration for the appellant because he thought the one view was inconsistent with, and would prejudice, the other, which was the defence mainly relied upon. We cannot, however, find that the jury ever had it brought to their minds that it was possible, if they thought it right, to adopt the view that the appellant was not guided by any evil intention, and had not the purpose of aiding and comforting the King's enemies. Neither can we say that the jury could not possibly have come to a conclusion favourable to the appellant if they had had the two alternatives before them As this Court has often ruled, it is not enough to support the conviction, that the jury might have come to the same conclusion had the proper direction been given. Before we can uphold a verdict of guilty found after a misdirection we must be satisfied that, had the proper direction been

given, the jury *must* have come to the same conclusion and convicted the prisoner. We cannot so hold in this case.

We cannot say that it follows from the evidence that the actions of the appellant were necessarily hostile to this country in intention and purpose, although there was undoubtedly evidence upon which the jury might have so found. Having come to the conclusion that a material point of the defence was not put to the jury, the Court thinks that the conviction cannot stand and must be quashed.

Conviction quashed.

Solicitor for the Appellant—*W. Watts Moses*, Sunderland.

A. L. B. T.

The Court (the Lord Chief Justice, Darling and Lush JJ.) sat on December 21st, 1914.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE BANKES.

1915
18 *January.*

EDWARD BERGER.

To make a defendant liable as a receiver of stolen goods with guilty knowledge the goods must have been within his control.

Appeal against conviction.

The appellant was convicted of receiving stolen goods well knowing them to have been stolen, before Judge Rentoul, at the Central Criminal Court, on December 11th, 1914, and was sentenced to three years' penal servitude and recommended for expulsion.

Raglan Somerset, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted, with two other men, Naterson and Hegdis, for having, upon November 9th, 1914, feloniously broken and entered the warehouse of one Hermann Wolff, and therein stolen certain goods, the property of the said Hermann Wolff, and, in a second count, for receiving these goods well knowing them to have been stolen. The jury returned a general verdict of guilty, but the learned judge indicated that the verdict could only be taken as one on the second count (*i.e.*, on the charge of receiving), there being no evidence against the appellant of warehouse breaking. The appellant kept a second-hand clothes shop in Hoxton. On the morning of November 9th, 1914, four sacks containing the property mentioned in the indictment were brought to the appellant's shop in a van by Naterson and Hegdis, and taken into the shop. Police officers thereupon entered the shop, and found one of the sacks on the

1915
18 *January.*

EDWARD BERGER.

Reading
L.C.J.
Ridley J.
Bankes J.

counter. There was no evidence as to who had put the sack on the counter, nor that the appellant had touched or dealt with it in any way. The explanation of the prisoner was that a short time previously he had let a room above his shop to Naterson, and that Naterson and Hegdis had brought the goods in order to place them in the room. On these facts not even constructive possession of the stolen goods was proved against the appellant. In *Wiley's Case*, 2 Den. C. C. 37; T. & M. 367; 20 L. J. M. C. 4; 15 Jur. 134; 4 Cox C. C. 412; (1850), the conviction on a similar charge was held to be wrong, and Wiley undoubtedly had a guilty intention. Here there was no evidence of any guilty intention on the part of the appellant. Even assuming that there was guilty intention, there was no evidence of any transfer in the possession of the goods, and the prisoner had no opportunity to put such intention into effect. *Wiley's Case* is an authority that under these circumstances the conviction should be quashed. In order to prove possession, evidence must be given of some overt act on the part of the prisoner. The learned judge misdirected the jury in that he did not clearly explain to them what possession by the appellant the prosecution would have to prove before the appellant could be found guilty. He referred also to *Crane*, 7 Cr. App. R. 113; 76 J. P. 261; (1912).

[He was stopped.]

Comyns Carr for the Crown. The appellant was rightly convicted. The direction by the learned judge was quite sufficient in the circumstances. Taken as a whole there was ample evidence on which the jury could convict, especially with regard to the fact that the stolen goods were brought on to the appellant's premises at an extremely early hour, when it would be inconceivable that the shop would be open for the purposes of the appellant's ordinary trade or business. In *Wiley's Case* there was no evidence that the prisoner had adopted the transaction, and in that respect it is distinguishable from the present case.

The LORD CHIEF JUSTICE: The question we are concerned with in this case is whether there was sufficient evidence and a sufficient direction to the jury by the learned judge for the conviction of the appellant to stand. The case against the appellant was

1915
18 *January.*

EDWARD BERGER.

Reading L.C.J.

undoubtedly extremely weak. It is a very fine point whether or not there was sufficient evidence against him of having received these goods well knowing them to have been stolen, which was the offence with which he was charged.

There are two questions to which our attention must be directed. First, was there evidence that the goods ever came into the possession of the appellant; and, secondly, was the direction by the learned judge to the jury sufficient to indicate to the jury the real test to be applied to the facts? With regard to the first point. Two men, named Hegdis and Naterson, were seen on a van which contained furs and other goods to the value of £750 which had been stolen from a warehouse the night before. They were followed, and the goods were brought to the shop of the appellant. Sacks were unloaded from the van, and when several had been unloaded, the police, who had been watching, entered the shop. It may be, as the learned judge pointed out, that if the police had waited a little longer they might have had conclusive evidence against the appellant, but we can say nothing as to that because they, in fact, did not wait. Having entered the shop, the police put questions to the appellant, the substance of whose answer was that he was the occupier of the premises, and that he had let a room above his shop to the man Naterson, and his explanation of the affair was that these persons had brought the goods in order to put them in the room which had been let to Naterson. When called as a witness, the appellant swore that he knew nothing about the goods.

It is difficult to say whether that amounted to evidence against him of possession of the goods or not, and it is still more difficult to decide what is the true test to be applied in these cases. There was a division of opinion in the case of *Wiley,* where a majority of judges came to the conclusion that the conviction was wrong. I do not propose to enter into the facts of that case, because the principle is well laid down in the words of Patteson J., who was one of the majority of judges. The learned judge said: "I do not think it necessary that in order to constitute a man a receiver it is necessary that he should touch the goods, or that under certain circumstances a party having a joint possession with the thieves may not be convicted as a receiver; but, I think, to make a person liable as a receiver, the goods must be under his control." (L. J.) That states the law accurately and in language which

1915
18 *January.*

EDWARD BERGER.

Reading L.C.J.

would be understood by the ordinary person who is not familiar with legal matters.

The jury should have been told that, before they could convict, they must be satisfied that the goods were under the control of the prisoner. The jury might have given an answer adverse to the appellant, but nobody can say with certainty that they were bound to do so. We are of opinion that, assuming that there was sufficient evidence upon which the case could be left to the jury, there was not a sufficient direction to the jury of the law applicable to this case. The learned judge did give instances illustrating the two extremes of possession and non-possession. In the vast majority of cases that might have been sufficient. But in this particular case, it was essential, in order that justice might be done, that the jury should understand precisely the question to be determined by them. The learned judge did not put that question clearly to the jury, and, therefore, we are of opinion that the conviction must be quashed.

Conviction quashed.

G. F. L. B.

THOMAS HAMPSON.

On the trial of an indictment for receiving stolen goods with guilty knowledge the jury should be expressly asked to consider whether defendant's explanation of his possession of the goods soon after the theft of them is reasonable or not.

An attempt to evade arrest should not be unduly insisted upon as evidence of guilt.

Appeal against conviction and sentence.

The appellant was convicted of receiving stolen goods well knowing them to have been stolen, before Judge Rentoul, at the Central Criminal Court, on December 14th, 1914, and was sentenced to five years' penal servitude.

J. A. Slater, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was charged on three indictments: (1) In the first count, for feloniously breaking

1915
18 *January.*

THOMAS HAMPSON.

Reading L.C.J.
Ridley J.
Bankes J.

into the dwelling-house of one Theobalds, on October 15th, 1914, and there stealing certain articles, the property of the said Theobalds, and, in the second count, with receiving the same well knowing them to have been stolen; (2) for breaking into the dwelling-house of one Bennett, on October 26th, 1914, with intent to commit a felony; (3) in the first count, for breaking into the dwelling-house of one Biss, on October 19th, 1914, and there stealing certain articles, the property of the said Biss, and, in the second count, with receiving the same well knowing them to have been stolen. The prosecution proceeded on the first of these indictments, namely, that in respect of October 15th. There was no evidence in respect of the first count, and the judge did not leave the question involved therein to the jury. On the sole remaining question whether the prisoner was guilty or not of receiving, the facts were these. On October 26th the appellant was arrested in consequence of a complaint made by a lady to the effect that he had broken into her house, and it was in respect of this charge that the second indictment was framed. He was only caught after a chase, but gave an explanation why he ran away from the policeman. At the trial, evidence of the circumstances of his arrest, and also evidence that at the time of his arrest some of the property stolen on October 19th (in respect of which charge the third indictment was framed) was found in his possession, was admitted. At the time of his arrest he was in the company of a lady who was wearing a coat which was one of the articles alleged to have been stolen on October 15th. He gave an explanation how the coat came into his possession, and of this his father gave corroborative evidence. In these circumstances the conviction should be quashed. The evidence of his arrest and the articles found on him—both matters connected with the other indictments on which he was charged—was wholly irrelevant on the charge contained in the first indictment, and should not have been admitted. Moreover, in his summing-up, the learned judge misdirected the jury both in fact and in law. Referring to the conduct of the prisoner in running away from the policeman on the day of his arrest, the learned judge said: "If he were an innocent man is that likely to have been his conduct?" thus directing the jury to take into consideration, in forming their verdict on the charge contained in the first indictment, evidence only admissible on the hearing of the charge contained in the

1915
18 *January.*

THOMAS HAMPSON.

Reading L.C.J. Ridley J. Bankes J.

second indictment. In another passage the learned judge said that the evidence of the prisoner, while not to be rejected because it came from the dock, was yet the evidence of a very interested party, and, "just as in a civil case, the evidence of an interested party is not one-tenth as strong . . . as the evidence of some impartial bystander." He applied the same remarks to the evidence of the appellant's father. That was a clear misdirection in law.

S. M Edwards for the Crown. Evidence must not necessarily be excluded because it may show that the prisoner has been guilty of another offence in addition to that in respect of which he is being charged.

BANKES J.: There was no direct evidence in this case that the appellant either stole the goods or was concerned in the stealing of them. The only evidence against him was that he was found dealing with them shortly after they were stolen. His defence was that he bought them. The question for the jury, therefore, was whether his explanation was one which they could reasonably believe. The appellant stated, in evidence, that he bought these goods, which it was alleged were those stolen on October 15th, in Petticoat Lane, and gave some of them as a present to the lady in whose possession they were found. His father gave evidence in corroboration of this story. Putting in somewhat different words what I have said above, the only question for the jury when they came to consider their verdict was whether they considered the explanation a reasonable one.

The summing-up of the learned judge has been attacked on two grounds: First, that he directed the jury wrongly in law when he warned them on the value of the evidence of the prisoner and his father, and, secondly, that he misdirected them on a question of fact when he suggested that the act of the appellant on October 26th, namely, his running away from the policeman who was endeavouring to arrest him for the crime committed on that day, was proof of his guilt in connection with the crime committed on October 15th. The latter appears to me to be the greater defect. The learned judge indicated this fact to the jury as a test whether the appellant in this particular transaction of receiving these goods knowing them to have been

1915
18 *January.*

THOMAS HAMPSON.

Bankes J.

stolen, was an innocent man or not. It seems to be quite irrelevant on that point. It might have been relevant whether or not he was a truthful man and whether or not the jury were to accept his story how he obtained these goods. But the judge suggested it as a complete test. We cannot allow this conviction to stand, as we think that the direction of the learned judge may very likely have misled the jury, and caused them to think that this was a most material point, whereas, in fact, it was, except to a very small extent, irrelevant. The conviction will therefore be quashed, but the appellant must remain in custody pending his trial on the other indictments.

Conviction quashed.

G. F. L. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE SHEARMAN.

ALFRED GOLATHAN.

1915
25 *January.*

When a defendant pleads guilty, the Court ought to satisfy itself that he confesses the full offence charged in the indictment.

This was an appeal against conviction and sentence, by leave of Ridley J. Appellant was convicted, at the Brecon County Sessions, on the 5th January, 1915, of entering a dwelling-house by night with intent to steal, and was sentenced to seven years' penal servitude.

Appellant, in person.

[The LORD CHIEF JUSTICE: What impresses us in this case is that the appellant was treated as if he had pleaded guilty to a very serious offence, whereas, if he intended to plead guilty at all, it was to a much less serious offence, and not one with which he was charged in the indictment.]

Roland Oliver, for the Crown. That is the case, and I am not prepared to argue that the conviction should be upheld. *William Baker* (28 T. L. R. 363; 7 Cr. App. R. 217; 1912) is authority that the Court can send the case back for trial. I must admit that on the evidence disclosed in the depositions there is a prospect that the appellant would be acquitted by the jury, but his record is a serious one, and suggests that when he went into the lady's bedroom a different kind of felony to stealing was contemplated.

The LORD CHIEF JUSTICE: The appellant was convicted on his own plea of unlawfully entering a dwelling-house by night with intent to steal, and was sentenced to seven years' penal servitude. He applied to this Court for leave to appeal, and obtained leave

1915
25 *January.*

ALFRED GOLATHAN.

Reading L.C.J.

from my brother Ridley to appeal both against conviction and sentence. It appears to be quite plain from reading the shorthand note that at the most he admitted entering the premises, but added that he did not do so for the purpose of stealing. That unfortunately was taken as a plea of guilty, and he was thereupon sentenced to a long term of penal servitude. Having regard to certain facts the Chairman of Quarter Sessions thought that if he were guilty, it was a case where it was necessary to pass a severe sentence.

In our view this man's plea was not a plea of guilty at all, and no man is to be convicted on a plea which is ambiguous. If there is any ambiguity it is to be taken as a plea of not guilty, and evidence given against him in the ordinary course. He must not be taken to have admitted his guilt unless he does so in unmistakeable terms. That being the opinion of the Court, this conviction must be quashed, and with it the sentence. The appellant was never tried for the offence, and in the ordinary course the Court has power to remit the case to be tried where a plea of guilty is acted on which is not really a plea of guilty. We have no power to order a new trial, but where there has been no trial we can order one, as was done in *Baker* [above] and *Ingleson*, 11 Cr. App. R. 21 (1914). The Court has said, in *Rhodes*, 11 Cr. App. R. 33 (1914), that it will take into account all the facts and circumstances of the case in order to satisfy itself whether the appellant has pleaded guilty or not. It is obvious that a man who has pleaded guilty to the offence cannot come to this Court and say that he did not understand or appreciate the effect of the plea. We think that in this case we have power to order that the appellant be kept in custody until the trial takes place, but the Court does not propose to take that course. We make no such order, and he will therefore be discharged. It is, of course, open to the prosecution to proceed with the trial of the indictment if it thinks fit, but, having perused the depositions, we think that it is at least doubtful, we will not say more than that, whether there is any evidence on which the appellant could be convicted of the offence with which he was charged.

Conviction quashed.

A. L. B. T.

ALBERT WILLIAM SMITH.

1915
25 *January.*

Reading
L.C.J.
Ridley J.
Shearman J.

On the trial of an indictment for obtaining by false pretences, the jury should be specifically directed that the obtaining must have been induced by the false pretence.

An agreement to pay house-rent by future instalments is obtaining credit within s. 5 (1) (a) of 3 & 4 Geo. 5, c. 34, the Bankruptcy and Deeds of Arrangement Act, 1913.

The general rule of the Court is to allow sentence to run from the date of conviction only when leave to appeal has been given.

Application for leave to appeal against conviction and sentence.

The applicant was convicted, at the Knutsford Quarter Sessions, on January 6th, 1915, upon an indictment charging him in three counts with obtaining credit and obtaining goods by false pretences and obtaining credit by means of other fraud, before the Chairman, and was sentenced to six months' hard labour, concurrent with a pending term.

Appeal against conviction on law, and application for leave to appeal against sentence.

The appellant was convicted, under 3 & 4 Geo. 5, c. 34, the Bankruptcy and Deeds of Arrangement Act, 1913, of obtaining credit to the extent of £10 and upwards while an undischarged bankrupt without informing the person so giving him credit of the fact that he was an undischarged bankrupt, at the Cheshire Quarter Sessions, on January 4th, 1915, before the Chairman, and was sentenced to four months' hard labour.

This application and this final appeal were heard together.

J. Herbert Williams for the appellant (under s. 10 of the Criminal Appeal Act), who was present. First, with regard to the conviction for obtaining goods and credit by false pretences. The applicant was charged on an indictment containing three counts: (1) of obtaining goods by false pretences; (2) obtaining credit by false pretences; and (3) obtaining credit by means of fraud other than false pretences. The applicant, with his wife and child, came to a hotel at Liscard saying that he had let his furnished house, and as the tenants wished to take possession sooner than he had expected, he therefore wanted some rooms for a few days. The prisoner in evidence said that he used the word "left" and not "let." The proprietor of the hotel, one Owen, let the applicant

1915
25 *January.*

ALBERT WILLIAM SMITH.

Reading
L.C.J.
Ridley J.
Shearman J.

rooms at £6 : 6*s.* 0*d.* per week. At the end of some five days, certain information concerning the applicant having reached the proprietor, who in consequence presented his bill for payment, the applicant left with his wife and child without paying the money he owed. On November 17th Owen laid an information against the applicant, and on November 23rd a warrant for his arrest was issued, but before he had heard of the warrant he had paid Owen in full. The Chairman, in his summing up, did not direct the jury specifically as to the difference between the offences contained in the three different counts in the indictment, nor that before they could return a verdict of guilty they must be satisfied that Owen was induced to give the applicant food and credit by the false pretences. In these circumstances the conviction cannot stand. *Norman's* case, above, p. 58.

[The LORD CHIEF JUSTICE: In *Norman's Case* this Court thought that if the jury had been properly directed they might have convicted the appellant of the lesser offence. On this point his Lordship also referred to the case of *David Johnston*, 9 Cr. App. R. 262; 1913.]

The defence was not fairly put before the jury, inasmuch as they were never directed that, in order that a verdict of guilty might be justified, they must be satisfied that the prosecutor was induced by the false pretences to give the applicant the goods and credit, there being, on the prosecutor's own evidence, strong grounds for saying that he was not induced thereby.

Secondly, with regard to the conviction for obtaining credit to the extent of £10 and upwards while an undischarged bankrupt without informing the person giving him credit that he was an undischarged bankrupt. On July 5th, 1911, the appellant was adjudicated bankrupt. He never obtained his discharge. In August, 1914, the appellant entered into a written agreement with one Jennings, under which Jennings let him a furnished house for six months at a rent of £8 per month, payable monthly. No rent, however, was paid, and in November the appellant left the house. There was then £24 rent owing. Jennings denied that the appellant ever told him that he was an undischarged bankrupt. Upon these facts no offence in law has been committed under s. 5 (1) (a) of the Bankruptcy, &c. Act, 1913, because the Act was never intended to apply to cases where a person takes a

1915
25 *January.*

ALBERT WILLIAM SMITH.

Reading
L.C.J.
Ridley J.
Shearman J.

furnished house, the rent being payable in future. It is usual to take houses upon the terms that rent is payable in future, and, according to the ordinary use and meaning of the word "credit," that is not obtaining "credit."

T. E. Morris, for the respondents, the Cheshire police authority. Although the Chairman had not explicitly directed the jury that they should be satisfied that Owen was induced to let his rooms on appellant's assertion that he had "let his furnished house," yet he had indirectly referred twice to that point, and, moreover, Owen had been recalled to deny appellant's evidence that the word he used was "left."

J. H. Williams replied.

The LORD CHIEF JUSTICE: In the application the first point made on behalf of the applicant was that the learned Chairman at the trial did not indicate clearly to the jury the difference between the offences in the three different counts in the indictment upon which the applicant was charged. This Court has had occasion to say before, in the case of *Johnston* (9 Cr. App. R. 262; 1913) and in the recent case of *Norman* [above, p. 58], that in these cases where there is a general verdict which amounts to a conviction upon the indictment without discriminating between the separate counts, the Court undoubtedly can, and in a proper case will, treat the conviction as if it had been upon the lesser of the charges. But nowhere has the Court said that in such circumstances the conviction ought to be quashed. This Court does its best not to favour technicality, but to deal with substance as the Act of Parliament intended it should. Mr. Williams's argument amounts at most to the contention that the applicant should be treated as if he had been convicted of the lesser of these offences. It would not make the slightest difference in this case. The Chairman treated the question in a very broad way, and left it to the jury to say whether the credit had been obtained by fraud. The more substantial point, and that upon which more reliance was placed, was that the jury had not been directed that they must be satisfied that the false pretences made did in fact induce the prosecutor to give the credit. Attention has been drawn to what took place at

1915
25 *January*.

ALBERT WILLIAM SMITH.

Reading L.C.J.

the trial. It is sufficient to say, indeed it could not be contended otherwise, that there was ample evidence upon which the jury could, if properly directed, have found a verdict against the applicant of obtaining credit by false pretences. The question is whether the direction was sufficient. We have to bear in mind that at the trial there was controversy whether what the prosecutor said was that he had "left" his furnished house or that he had "let" it. The prosecutor was recalled after the applicant had given evidence that the point might be specifically put. Nothing could better shew the jury the importance of the matter. Moreover, we must remember that the jury had the advantage of hearing the speeches by counsel on both sides, who were clearly aware of what the substantial points in issue were. It is quite true that it would have been better for the Chairman specifically to direct the attention of the jury to the issue concerning the inducement, and it would have been undoubtedly better if he had directed the jury that before they could find a verdict against the applicant they must be satisfied that the representation had induced the prosecutor to give the credit. The criticism which is directed against the summing up is justified to that extent. We have to consider whether that is sufficient ground for quashing the conviction. We have often had occasion to say in this Court —and I now repeat it—that this Court does not look too minutely to a summing up of a judge to the jury. A summing up directs the attention of the jury to the salient points of a case, and it would be wrong and lead to pedantry and technicality and injustice if we scrutinised it too strictly. On the other hand, this Court must take care that the case is properly put to the jury so that they understand the points in issue. Having regard to all that took place at the trial of this case, this Court cannot say that the jury were not made aware that before convicting the accused it was essential that they should find that the prosecutor had been induced to give the credit by the false pretence. Although we think that it was rather regrettable that the point was not specifically put, we are satisfied that on the whole the jury had the point before them. There has been no miscarriage of justice, and the conviction must stand.

In the appeal against conviction the ground of appeal was that no offence was proved in law. The offence charged was that the appellant, by not disclosing the fact that he was an undis-

1915
25 *January.*

ALBERT WILLIAM SMITH.

Reading L.C.J.

charged bankrupt, caused one Jennings to enter into an agreement by which the appellant was allowed to occupy a furnished house upon the terms that he would in future pay a monthly rent. Counsel for the appellant says that that is not obtaining credit within the meaning of the Bankruptcy, &c. Act, 1913. We think there is no substance in that point, and that the conviction must stand.

The application for leave to appeal against conviction and sentence, and the final appeal against conviction, will, therefore, be dismissed.

The sentence must run from the date of the hearing of this appeal, the rule followed by this Court being that sentences shall run from the date of the conviction only when leave to appeal has been obtained.

Application refused and Appeal dismissed.

Solicitors for the respondents—*Chamberlain & Co.* for *H. W. Cook*, Wallasey.

G. F. L. B.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE BRAY, AND MR. JUSTICE ATKIN.

1915
1 *February.*

WILLIAM MILLINGTON.

On charges of receiving stolen property with guilty knowledge, the jury should be directed that the trifling value of the chattel in question may be relevant to the accused's explanation.

This was an appeal against conviction and sentence, by leave of Ridley J. Appellant was convicted, at the Middlesex Sessions, on the 9th January, 1915, of feloniously receiving stolen property, and was sentenced to twelve months' imprisonment with hard labour.

F. Watt for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was charged with two other men named Cooper and Brown on three indictments charging them with house-breaking and receiving. Brown pleaded guilty to the three indictments. No evidence on one indictment was offered against the other two prisoners. The appellant was convicted on a second, the third being left on the file as against him. There is no dispute as to the facts, but the appeal is based mainly on the ground of misdirection, the summing up being contrary to the doctrine laid down in *Schama and Abramovitch*, 31 T. L. R. 88; 11 Cr. App. R. 45 (1914). Evidence was also improperly admitted. The property was stolen from a house in Enfield Lock, on the 25th November, and on the 5th December detectives saw the three prisoners in a coffee shop in Edmonton, passing some of the stolen property from one to the other. The only property seen in the possession of the appellant was a cigarette case and a threepenny piece with two holes in

1915
1 *February.*

WILLIAM MILLINGTON.

Ridley J.
Bray J.
Atkin J.

it. The appellant made a statement to the jury in which he said that he met Brown in the coffee shop, having seen him once or twice before, and that Brown asked him to buy the cigarette case; he answered that he had no money, but might try and sell it for him. Brown thereupon gave him the case to look at, and he found the threepenny piece inside. He asked Brown to give it him, and he assented; the appellant then returned the cigarette case to him. The Chairman said that this statement was immaterial. The jury should have been told that if they thought the statement might be true the appellant was entitled to be acquitted. (He was stopped by the Court.)

Purcell, for the Crown. My difficulty is to see any evidence on which the conviction can be supported, though I think the summing up can be justified. There was no evidence of guilty knowledge beyond the possession of the threepenny piece ten days after the theft. In the third case, which was not tried, I think there is no evidence at all against the appellant.

RIDLEY J.: In this case three men, Millington, Cooper, and Brown, were charged by indictment with breaking into a gentleman's house and stealing a quantity of articles, including money, a brooch, a cigarette case, &c. By a second count they were charged with receiving these goods knowing them to have been stolen. Brown pleaded guilty, an acquittal was directed as to Cooper, and Millington was convicted of receiving, but the only piece of property traced to his possession was a threepenny piece. It cannot be questioned that this was part of the stolen property, and it was also proved that the appellant was in possession of it. On the 5th December, ten days after the robbery, the three men were together handing the cigarette case about. Brown handed the threepenny piece to the appellant. The account given by the detectives was that they were not sure in the bad light how it actually passed; but the appellant's own account is that he had just met Brown, to whom he had spoken two or three times before; Brown asked him if he would buy the cigarette case; he answered that he had no money, but might try and sell it; he asked Brown to shew him the case, and when he did so he found the threepenny piece in it; he asked if he might keep it and Brown said "Yes."

In these circumstances the rule laid down by the Court in

1915
1 *February.*
WILLIAM MILLINGTON.
Ridley J.

Schama and Abramovitch had to be followed. I am not prepared to say that the summing-up taken as a whole is not a proper direction, though one sentence taken alone is not so, namely, "The prosecution having proved that, in the absence of any reasonable explanation given by these men, the natural inference to any ordinary person is that they are guilty of receiving this property knowing it to have been stolen." If taken by itself that is not quite correct. The prosecution must prove not only the receipt of the goods, but the knowledge that they had been stolen; the jury ought to be told that the mere fact of possession is not enough. The prosecution must prove knowledge, but an explanation may come from the prisoner. The Chairman does not point out that the excuse is for the jury to judge of, and to say whether it is unreasonable.

A more substantial matter seems to us that in directing the jury the Chairman does not get at a proper view of the facts. The value of the property was only threepence, and a very different state of things arises from that where the property is of great value. The proper direction would have been that in judging the excuse the jury must consider the value of the article, and that it was not necessary, having regard to the value of the article in this case, to laugh at the story told by the appellant. They should also have been told to pay regard to the fact that none of the rest of the stolen property was found in his possession. The Chairman said that the story told by the appellant was immaterial; we do not think that that is the correct view.

There is another reason why the summing-up may have misled the jury; evidence was given afterwards which shews that the jury suspected the men of being associates. The other two indictments were put to the appellant in the presence of the jury, which may have given rise to their suspicions. On the whole the Court thinks the conviction must be quashed, and no further order will be made.

Conviction quashed.

A. L. B. T.

ERNEST READ.

1915
1 *February.*

Ridley J.
Bray J.
Atkin J.

Severity of sentence on accessory mitigated in view of that on principal.

This was an appeal against sentence, by leave of Ridley J. Appellant was convicted, at the Central Criminal Court, on the 12th January, 1915, of aiding and abetting bigamy, before the Recorder, and was sentenced to nine months' imprisonment with hard labour.

Appellant in person.

Warburton for the Crown. The sentence seems rather hard in view of the fact that the main offender was only sentenced to three months' imprisonment. The case arose from an assault by the appellant on a woman; she complained to the police, and on being asked to sign the charge sheet explained that they had been through the form of marriage, although she was already married. The appellant said he went through the form of marriage with her firstly, for honour, and, secondly, to get her a separation allowance as he was going to enlist. He did not enlist in fact.

RIDLEY J.: The Court has considerable hesitation whether to interfere or not in this case. On the whole it seems that the Recorder left the charge of assault out of consideration for the magistrate to deal with if he desired to do so, but said he passed a sentence of nine months' imprisonment because he had gone through the ceremony of marriage for the purpose of defrauding the tax-payers. We do not think that that is a sufficient reason for sentencing the appellant to nine months', and the woman, who was the principal offender, to only three months' imprisonment. She knew as well as he the reason for the marriage. We are always loth to interfere with a sentence unless it is clear that it is inconsistent with the merits of the case, but here, where the two cases are in contrast, we think they ought to be alike, namely, three months' imprisonment with hard labour. It must be remembered that the appellant was in prison for five weeks before his trial

Sentence reduced.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE ATKIN.

1915
8 *February.*

FREDERICK BACON.

The Court will itself, if necessary, examine the finger-prints alleged to be those of an appellant.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted at the Middlesex Sessions, on the 9th of January, 1915, of larceny, and was sentenced to fifteen months' imprisonment with hard labour.

Appellant in person.

May for the Crown.

The appellant protested that evidence of previous convictions in various names which he had never had had been given against him at his trial, and suggested that in some cases he had been mistaken for his brother. Evidence of the convictions was given by police officers, all of whom identified the appellant as the man who had been convicted. The Court adjourned the case in order that an official from Scotland Yard should produce the finger-prints. These were produced after the luncheon adjournment by Detective-Inspector Alden, and after hearing his evidence the Court examined the finger-prints.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to stealing an overcoat, and was sentenced to fifteen months' imprisonment with hard labour. He appeals for a reduction of that sentence. At the trial eight previous convictions were proved

1915
8 *February.*

FREDERICK BACON.

Reading L.C.J.

against him, but it turns out that some of them were in names other than that of Bacon—namely, Cox, Barnes, Llewellyn, and Barrell. It is said, however, that they and Bacon were all names of the same man. The appellant denied these previous convictions, except in one case; but on the production of the finger-prints, which we have examined, and on which we have heard the evidence of Detective-Inspector Alden, we have no doubt that they are all the same, and that they tally with the finger-prints of the appellant. The Court gave leave to appeal in order that it might test the question of previous convictions. It seems now to us quite clear that the sentence should not be reduced, and the time which the appellant has already served is not to count.

Appeal dismissed.

A. L. B. T.

ALBERT KUPFER.

8 & 9 *Feb.*

The Trading with the Enemy Act, 1914 (4 & 5 *Geo.* 5, *c.* 87, *amended by* 5 *Geo.* 5, *c.* 12), *is aimed at transactions indirectly* (*as well as those directly*) *enuring to the benefit of an enemy. On the trial of an indictment thereunder a question for the jury is whether defendant knew or not that the transaction would have that effect.*

This was an appeal against conviction, on the certificate of Rowlatt J., who tried the case, and an application for leave to appeal against sentence. Appellant was convicted, at the Central Criminal Court, on the 18th January, 1915, of trading with the enemy, and was sentenced to one month's imprisonment in the second division.

Sir Edward Carson, K.C. (with him *Colam, K.C.*, and *Huntly Jenkins*), for the appellant who was present. The appellant was a partner in a firm of Bettman and Kupfer, the other partners being his brothers, Richard and Sidney Kupfer. The three partners were naturalised British subjects who had been born in Germany of American parents. The firm were export merchants, mainly in enamel, and they had branches in Frankfort, London and elsewhere. Frankfort was treated as the head office,

1915
8 & 9 *Feb.*

ALBERT KUPFER.

Reading L.C.J.
Ridley J.
Atkin J.

and that was managed by the other two partners, while the appellant managed the London branch. In London, sales were made and moneys collected and remitted to Frankfort. An account was kept at the London City and Midland Bank, on which both the London and Frankfort offices could draw. The Frankfort office did business with a large firm at Terborg in Holland, who were manufacturers of enamelled ironware, and before war broke out an order had been placed with them by the Frankfort office to the extent of £750. The Frankfort office suggested, on the 4th August, that these contracts should be taken over by the London branch, and the Terborg firm agreed, but insisted on payment of the money due to them. The London firm paid £500 on the 9th September, and £250 on the 28th October; payments were made in one case to the London branch of a Dutch firm, and in another to a firm of Blydenstein who carried on a banking business in London.

My first ground of appeal is that when a partner in this country pays a debt which was incurred before the war to a creditor in a neutral country, he does not make a payment for the benefit of the enemy within the meaning of the Trading with the Enemy Proclamation, No. 2 (Manual of Emergency Legislation, p. 378), of the 9th September, or the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87, amended 5 Geo. 5, c. 12). You cannot dissociate the three partners because two live in Germany and one here. The appellant was paying debts of the firm for which he was legally liable; if he had been sued he could have been compelled to pay, and it cannot be a crime if he pays the debt without waiting for legal proceedings. No doubt the partnership came to an end at the outbreak of the war, and the appellant must be supposed to know this, though in fact it is very doubtful if he did, but this would not affect his liability for debts incurred by the partnership before the war. I must also admit, after the recent decisions in the Court of Appeal, that the other two partners are statutory alien enemies, though they are in fact interned in Germany as British subjects. The payment was not for the benefit of an alien enemy, but for the benefit of the appellant himself.

Secondly, the payments were permissible as being within par. 7 of the Trading with the Enemy Proclamation, No. 2, of the 9th September, 1914, which was as follows: "Nothing in this

1915
8 & 9 *Feb.*

ALBERT KUPFER.

Reading L.C.J.
Ridley J.
Atkin J.

Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business, or being within Our Dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted." I admit that the firms who received payment in London were only channels for transmission to Holland, but the object of the section was that the Government should have jurisdiction and control over payments made here, and they had such control in this case.

Lastly, the judge misdirected the jury by telling them that even if the appellant's object was to benefit himself by "collaring the business" for the London firm he would still be guilty. He also told them that par. 7 of the Proclamation referred to transactions which called for payment in this country; I submit that there was no justification for this addition to the provision.

If there was an offence at all it was a most technical one, as it only consisted in not waiting to be sued; in these circumstances the sentence was excessive.

R. D. Muir (with him *E. C. P. Boyd*), for the Crown. There is no foundation for the proposition that if the appellant had been sued for the debt he would have been bound to pay. The Court would enquire whether the payment would enure for the benefit of an enemy, and either make no order for payment or order payment to be made to the custodian. That course was adopted last week by Rowlatt J. in *Schmidt* v. *Van der Veen*, Times Newspaper, 6th Feb., 1915. The Court can take notice of an illegality even if the parties do not raise the point: *Evans* v. *Richardson*, 3 Merivale, 469 (1817). In making the payments to Terborg the appellant was acting under direct instructions received from the Frankfort branch in a letter of the 26th August, 1914, in which he was told to pay and to cancel two cheques which had already been drawn for payment of these debts.

In deciding whether a payment comes within par. 7 of the Proclamation of the 9th September, the Court will look at the substance of the transaction and not the mere form. The clause was intended to enable persons who are really resident in this country to obtain payment of debts due from enemies. (He was stopped by the Court on this point.)

The summing-up was correct; if the payment was made to

1915
8 & 9 *Feb.*

ALBERT KUPFER.

Reading L.C.J.
Ridley J.
Atkin J.

benefit alien enemies it does not matter if incidentally it also benefits the appellant himself. I submit that if the payment does in fact benefit the enemy an offence is committed, and therefore the summing-up on this point was, if anything, too favourable to the appellant.

Carson, K.C., in reply. *Schmidt* v. *Van der Veen* is distinguishable; the case was parallel to an action brought by an alien enemy; here the action would have been brought by a neutral.

The LORD CHIEF JUSTICE: The appellant was indicted for conspiracy with his brothers and another unlawfully to trade with the enemy. That count was not proceeded with. He was also charged with trading with the enemy by making payments of £500 and £39 7*s*. 1*d*. for the benefit of certain enemies, namely, his two brothers, who carried on business in Frankfort. There were other counts of a similar character on which he was acquitted. The appellant appeals against his conviction on the ground that neither of the two payments was made for the benefit of enemies. The case undoubtedly raises difficult questions of law, though there is no doubt as to the true state of the facts. It is necessary to state the material facts with some particularity.

The firm of Bettman and Kupfer traded in Frankfort, London, and elsewhere; there were three partners, Sidney and Richard Kupfer, who resided at Frankfort, in Germany, and the appellant, who resided in London. The business of the firm consisted substantially in the purchase of manufactured goods, and the shipment of those goods abroad to British Colonies and elsewhere. In the main the activities of the appellant were centred in London in collecting moneys due to the firm and remitting them to the house in Frankfort. Throughout the case reference has been made to the Frankfort and the London houses, but it is apparent that these are merely convenient terms, and that the business was carried on by two of the three partners in Germany, and by one of the three in London, and that no distinction can be drawn between the partnership business in Frankfort or London. At an early date, on the 4th August, before war was declared between England and Germany, a letter was written in anticipation of the difficulty of carrying on business in Germany during war,

and particularly of receiving remittances from England. The Frankfort partners wrote to the appellant, and from this and other letters it is abundantly plain that the London partner until war broke out had no business relations with Terborg, which was a convenient name used during the case for the firm in Holland, and that the London partner knew so little of Terborg that in the letter of the 4th August their address is given, and instructions are sent by the Frankfort partners to the appellant to get into direct communication with Terborg, and to ship orders through a Rotterdam firm. The anticipations that business with London would be broken off were justified, and war was declared on the 4th August at 11 p.m., and commercial intercourse between Germany and Great Britain was prohibited.

Since a recent decision of the Court of Appeal there is no doubt that a British subject carrying on business or resident in an enemy country is to be treated, as far as commercial intercourse is concerned, as an alien enemy. In this case all the Kupfers were naturalised British subjects, but, in the circumstances, the two partners resident in Frankfort must be treated as alien enemies, and the one in this country is entitled to the full rights, liberties, and bound by the obligations of a British subject.

The correspondence shews that Frankfort was issuing instructions to the appellant, giving him directions how to carry on the business and complete the transactions begun at Frankfort before war broke out. On the 13th August, after some letters had passed, the appellant wrote to Terborg, and that is the first communication between London and Terborg according to the evidence. In that letter he states in terms that the Frankfort house had asked him to enter into direct communication with reference to further orders for enamel ware. On the 17th August comes the first communication from Terborg to London in answer. They say that when entering into direct communication with London they are willing to do so on the basis of their contract with Frankfort, and that London is also to pay the amount due from Frankfort. Then the intention is announced by Terborg of receiving payment through Blydenstein, a firm of foreign bankers in London. There is one other letter of importance, dated the 26th August, from Frankfort to Terborg. It was not written to the appellant, but was enclosed in a letter from Terborg to London because it was intended that it should be so enclosed, and there is nothing to indi-

1915
8 & 9 *Feb.*

ALBERT KUPFER.

Reading L.C.J.

cate any surprise or objection on the part of the appellant—it was the indirect means of communication between Frankfort and London; he acted on the letter. The letter shews that three cheques had been drawn before the war by the appellant on the London City and Midland Bank payable in London and sent to Frankfort. At the commencement of the war M.14,916, which approximately equals £750, were due from Frankfort for orders to Terborg. Payment was made by London of £500 to Blydenstein, with the object that that sum should be paid to Blydenstein's house in Holland, by whom it was to be remitted to Terborg. The effect was that £500 out of the £750 due from Frankfort to Terborg was paid by London handing over £500 for transmission to Holland in liquidation of the amount due by the partnership for liabilities of the house conducted by the two enemy partners of the firm; therefore, to the extent of £500, the liabilities of the German house were liquidated, London paying £500 for which Terborg had looked to Frankfort only To that extent the resources of individuals in Germany were augmented or protected, and the resources of individuals in this country diminished.

In the letter of the 26th August it was made clear that the intention was that two of the three cheques drawn by the appellant at the beginning of the war in favour of the Frankfort house, for the purpose of remitting to them moneys collected here by the appellant, should be treated as cancelled by the payment of the £500; so that in effect the appellant debited Frankfort with the £500, and Frankfort credited the appellant with that sum. That is the state of affairs, and it is only necessary to add that throughout the transactions instructions were being received by London from Frankfort. Blydenstein began to get alarmed, and doubted whether they ought to make the payments; probably the German name roused their suspicions. They made enquiries with the result that the appellant assured them that the firm was British. He was justified to this extent, that the members were subjects of the British Crown, but it cannot be said that it was a candid statement. Invoices were produced to Blydenstein, which we have had an opportunity of closely examining. These shew that the word "London" had been written after the erasure of "Frankfurt," or "Frankfurt-am-Main." It is said that it is natural, as by that time the goods were to be treated as invoiced to London, but it does appear that those statements to Blydenstein were neither plain

1915
8 & 9 *Feb.*

ALBERT KUPFER.

Reading L.C.J.

nor frank. There is no desire to press these statements too harshly against the appellant, but they form material, upon which it was legitimate to comment to the jury, that the statements were made to conceal the fact that the firm carried on business in Frankfort and that the goods were shipped to the order of the Frankfort house.

By the Trading with the Enemy Act, 1914, power is given to send an inspector to the office of a firm carrying on business in this country; one was sent, an examination was made of the documents, and in consequence of the information obtained this prosecution was launched. By the Trading with the Enemy Amendment Act [5 Geo. 5, c. 12] that information could be used in evidence against the appellant. Rowlatt J. left to the jury substantially certain questions which had been raised. It is sufficient to say that the summing up viewed as a whole cannot be said to put the case unfavourably to the appellant.

Three points have been raised by Sir Edward Carson in his arguments before us; the first is that on which most insistence was placed, and is in our view the most difficult point. It is said that the appellant being a partner resident in this country was merely paying the debts of a firm of which he was a member, in respect of transactions entered into before the war, to a neutral; and that therefore the payment was not to an enemy, and cannot in any circumstances be treated as a payment for the benefit of an enemy. The indictment is based on a Proclamation issued on the 9th September, par. 5 (1) of which prohibits payments of "any sum to or for the benefit of an enemy." The Proclamation was validated by the Act of the 18th September [4 & 5 Geo. 5, c. 87], so it has the full force and effect of a statute. In our opinion the words "for the benefit of an enemy" are deliberately introduced to defeat devices by which a mercantile house might attempt to make payments to the enemy in spite of the enactment. It may have been thought necessary to cover the ground so that there might not be a means of evading the law and assisting the enemy. The words are very wide, and must be construed as having a very wide application. It is not necessary or desirable to define exactly their meaning. They are certainly intended to cover indirect means of making payments to the enemy.

That being the law, and although there is no doubt that the payment by the appellant to Terborg did in fact benefit the enemy

1915
8 & 9 *Feb.*

ALBERT KUPFER.

Reading L.C.J.

partners, it is said on behalf of the appellant that as he was liable as a member of the firm to make the payment he could not by making such payment have committed a crime; he had merely done what he was legally compellable to do. Our conclusion is that this does not represent the true state of the facts. There is no indication in the letters of any demand or threat by Terborg to the appellant for payment of the debt due by the Frankfort house. It is no doubt true that if the appellant had been compelled by judicial pressure to pay Terborg, the payment could not be a crime. It may be true, though we do not decide it, that payment on a threat of process might be justified. There might be collusion or other circumstances which would have to be considered, so we do not decide that point. According to the law, as contended by the appellant and as we assume it to be, the partnership came to an end when war was declared. There can be no partnership between an enemy and a subject of this country when war has broken out and during the war. That is used by the defence for the purpose of proving that the appellant was liable for the full amount of the debt as one who had been a partner. There is in fact no trace of that view in the correspondence. Then it is urged that he must be presumed to know the law, and that therefore it must be inferred that he paid to liquidate his personal liability to Terborg. One cannot but observe that at the beginning of the war very few persons would have known that the partnership came to an end when war commenced. But if we assume that the partnership came to an end, and that the appellant knew it, what is the position ? From the moment when war began until a late date in the correspondence there is commercial intercourse between alien enemies in Frankfort and a British subject; it never ceases; direct communication stopped because it became impossible, but, by means of Holland, communication is still kept up between Frankfort and London. If the result of these communications is that the appellant, on instructions from Frankfort, makes a payment to Terborg, it is impossible to say that the defence that he paid because he was compellable to pay must avail him. Once the partnership came to an end there is no justification in law for the continued correspondence and business relations between alien enemies and a British subject, which led to the payment. It is clear that in fact the appellant paid Terborg because he was instructed by the alien enemies to do so, and for no other reason.

1915
8 & 9 *Feb.*

ALBERT KUPFER.

Reading L.C.J.

It is further contended that these were payments within par. 7 of the Proclamation; "by or on account of enemies to persons resident" or "carrying on business" within this country arising "out of transactions entered into before the outbreak of war," and therefore permissible. It is sufficient to say that the facts do not in our judgment bring the payments within that paragraph. The money was merely handed over to Blydenstein for the purpose of being sent abroad in discharge of the obligations of the enemy partners of the firm. Indeed, this was not a payment by or on account of the enemy, but a payment to or for the benefit of the enemy. No such payment is within the paragraph.

The third point raised is that the judge misdirected the jury by telling them that if the intention of the appellant was to obtain the business for London that was not quite an answer to the case. It is argued that the intention of the appellant was to get the business transferred to London so that he might carry it on, and if so that he was not acting for the benefit of the enemy. His intention is a question of fact, and looking at the summing up, and taking it altogether without too microscopic an examination, the judge in our opinion was right in saying that it was not quite an answer merely to say that the act in question would benefit the appellant and that he had that object in mind. It was a point for the consideration of the jury, and so the judge put it. In substance he said it was a question for the jury whether the appellant made the payment knowing that it would in fact benefit, and in order to benefit, the enemy. We do not decide that it might not be an offence although not made in order to benefit the enemy; the case was put not unfavourably to the appellant, and there has been no misdirection.

It is urged that the sentence is too severe. We desire to make it quite plain that the offence of trading with the enemy is a serious offence, and should be dealt with seriously by those who have to try such cases. The object of punishment is to deter those persons who may be tempted by the hope of gain to engage in business which would add to the financial resources of the enemy and so prolong the war. In our view nothing said by us or by Rowlatt J. should give the slightest colour to the notion that these offences merit only a slight punishment. In this case the judge had all the circumstances before him to enable him to deal justly with the appellant. In our opinion the sentence cannot be

1915
8 & 9 *Feb.*

ALBERT KUPFER.

Reading L.C.J.

said to be too severe, and we certainly shall not reduce it. We make these observations as to the gravity of the offence, lest it might be thought that other cases would be dealt with by equally light sentences. There are circumstances here which justified the judge in passing a light sentence, but in future the law will be enforced with proper severity.

Appeal dismissed.

Solicitor for the Appellant—*Herbert Oppenheim.*

A. L. B. T.

9 *February.*

GREGORY MELIK.

The Court will not take notice of a letter written by a juryman after a trial to the trial judge.

This was an appeal against conviction and sentence, by leave of Ridley J. Appellant was convicted, at the County of London Sessions, on the 7th January, 1915, of attempting to obtain money by false pretences, before the Deputy-Chairman, and was sentenced to six months' imprisonment in the second division.

St. John Hutchinson for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

Wallington, for the Crown.

This case was of no legal interest, but in the course of the argument counsel for the appellant referred to a letter which had been written to the Deputy-Chairman by one of the jurymen who tried the case.

The LORD CHIEF JUSTICE: We pay no attention to that letter, neither must you pay any attention to it. The Court will not take notice of a letter from a juryman after a trial, written either as to matters which came to his knowledge after the trial, or as to matters which influenced him in coming to a conclusion with regard to the verdict.

A. L. B. T.

ALBERT JOHN DANIELS.

1915
9 *February.*

Reading
L.C.J.
Ridley J.
Atkin J.

Severity of sentence.
The Court may take into consideration specific penalties consequent upon sentence.

This was an appeal against conviction and sentence, by leave of Ridley J. Appellant was convicted, at the Canterbury Sessions, on the 11th January, 1915, of larceny, and was sentenced to fifteen months' imprisonment in the second division.

George Elliott, K.C. (with him *J. G. Joseph*), for the appellant, who was present. The appellant was quartermaster-sergeant in the East Kent Mounted Rifles, and he was convicted of stealing two hind quarters of beef from the Army Service Corps depôt at Canterbury West Station. The defence relied on was an unwritten unofficial, but well known existing practice by which a quartermaster-sergeant is entitled to claim, either from day to day, or after a certain amount has accumulated, so many pounds of meat for every quarter consumed. The practice is to claim for himself and for those who work under him, and it is a practice well known to the Army Service Corps. The evidence of Captain Hacking, who was in charge of the Army Service Corps depôt at Canterbury, bore out this, and made the case so unsafe that it ought never to have gone to the jury.

Even if the conviction must stand, the sentence was excessive in view of the exceptional character given the appellant by witnesses, his good services in the South African War, and the fact that the jury recommended him to mercy. By s. 2 of 33 & 34 Vict. c. 23, the Forfeiture Act, 1870, a sentence with hard labour, or a sentence without hard labour of more than twelve months, carries with it the loss of pension and inability to hold any public office.

Thesiger, for the Crown.

The Lord Chief Justice: The appellant was convicted on indictment of stealing two hind quarters of beef, and he was sentenced to fifteen months' imprisonment in the second division. He appeals against his conviction and sentence. He was the

1915
9 *February.*

ALBERT JOHN DANIELS.

Reading L.C.J.

quartermaster-sergeant of the East Kent Mounted Rifles, and it was his duty to draw stores and rations for his regiment from the Army Service Corps depôt at Canterbury West Station. On the 24th November he went to the station, where a certain number of pieces of beef were loaded on the waggon; two quarters were afterwards transferred to a trolley belonging to Edwards, the regimental butcher, who also carried on business as a butcher in the neighbourhood, and payment was made by Edwards to the appellant for the meat.

There is no dispute as to the facts, but the suggested defence is a practice which it is neither easy to gather from the evidence, nor to state, and which even so expert a counsel as Mr. Elliott found it difficult to put in language which would stand criticism. He says there was a practice by which the appellant was entitled as quartermaster-sergeant to so much meat. The quantity could be allowed to accumulate without any record or anything in the books to shew how much had been taken or how much had accumulated. He could go and say how much in his view he was entitled to take, could take it and sell it, and put the money in his pocket or divide it with his comrades. It is not remarkable that it is difficult to state such a defence in a court of law, and still more difficult to prove it. Nevertheless, if the evidence shewed that there was such a practice, however reprehensible it may be, a man ought not to be convicted of a crime if he acted in pursuance of it. The difficulty is that Mr. Elliott cannot substantiate that any evidence of such a practice was given for the prosecution. At most the evidence shews that the quartermaster-sergeant is entitled to draw the meat, but that is a very short distance along the road the appellant has to travel. He has to prove his right to sell it and to appropriate the proceeds of the sale. Captain Hacking is against the appellant on this point, and no one has said that the appellant had any right to dispose of the meat. There was abundant evidence on which the jury could conclude that the meat was stolen by the appellant, no complaint can be made of the summing up, and therefore the conviction must stand.

It is said that the sentence is a very severe one, having regard to the history of the appellant and the laxity of practice that prevailed. The Court is anxious to make it clear that offences of this character committed in time of war are serious, and that even an excellent character hitherto borne should not prevent a

1915
9 *February.*

ALBERT JOHN DANIELS.

Reading L.C.J.

serious punishment being imposed. Nothing that I am about to say means that we are in any degree palliating the offence. But taking into account the evidence of his past character, the service he had rendered in former years, the record he has after many years in the army, the disgrace inflicted by the conviction itself, and the serious penalties incurred over and above the sentence by the Army Regulations if more than one year's imprisonment is passed, we think the sentence might properly be reduced to nine months' imprisonment in the second division, the time he has been in prison to count.

Sentence reduced.

Solicitors for the Appellant—*Mowll & Mowll,* Canterbury.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE SHEARMAN.

1915
15 *February*

NATHAN FRANKS.

When a defendant on his trial has unnecessarily let in evidence of a previous conviction, the Court will take into account its effect on the jury.

This was an appeal against conviction, by leave of the full Court. Appellant was convicted, at the County of London Sessions, on the 5th January, 1915, of larceny, before the Deputy-Chairman, and was sentenced to two years' imprisonment with hard labour.

Thesiger for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted with three other men named Miller, Norman, and Norton, for larceny of a barrow and 150 pairs of curtains. Norman, who was in the employment of the owner, pleaded guilty. The evidence for the prosecution shewed that the appellant and Norman were seen leaving a yard at 1 p.m. on the 15th December, the day after the theft; the appellant was carrying a large bundle. The detectives found in the yard the barrow and a sack containing a quantity of the stolen curtains. They waited till 5.45 p.m., when Norman and Miller appeared and began to wheel the barrow away, and were arrested. Appellant was also arrested on that day. Later in the evening detectives went to a common lodging-house where three packets, each containing five pairs of the stolen curtains, were found. It was not suggested that the appellant had ever been to this lodging-house. The following questions were put to the detective at the trial by counsel for the Crown:—

Q. What were the curtains contained in? Was it paper like the paper that was being taken away in the morning—the parcels?

A. That paper (pointing).

Q. Are those the three bundles?

A. That is the three bundles found in the lodging-house.

Q. And they look exactly as they did then?

A. Oh, yes, sir.

It is not very clear whether the detective meant to say that the bundle carried by the appellant was wrapped in the same kind of paper as the packets found at the lodging-house. Even if he did it is not suggested that the paper was of an unusual description, and therefore the evidence was of little, if any, value.

Evidence was also given that in the charge-room Miller said to the appellant, "This is what you get for doing it unbeknown to me. How much did you get for it?" to which the appellant answered, "Ten shillings; we had a dollar each." This evidence is very vague, and I do not know what meaning the prosecution suggest that it should bear. The appellant brought out in cross-examination that he had been previously convicted, and he also was on some points clearly not a truthful witness, but this latter fact, though it may discredit his own evidence, does not establish the case against him. In these circumstances, where the jury were certain to be prejudiced against the appellant, it was most necessary that there should be a fair and careful direction to the jury.

The Deputy-Chairman misdirected the jury on the question of possession. He said, "It is for you to say whether, when he was dealing with that stolen property, there could be the smallest doubt that he knew perfectly well that it was stolen. If you think that it was not part of the stolen property that Norman and the other were so carrying away, but that it was something else, then there would be no evidence at all that Franks was ever in possession of stolen property; but if you have no reasonable doubt that the parcel they were carrying away was a parcel similar to the parcels which were discovered the next day, containing curtains similar to those which were left behind, then, gentlemen, Franks would have been found in joint possession with the other man with whom he was working of property which had recently been stolen." This direction assumes that there was evidence of similarity, whereas in fact there was none, or at most the merest scintilla.

1915
15 *February.*

NATHAN FRANKS.

Reading L.C.J.
Bray J.
Shearman J.

[BRAY J.: From the depositions it appears that the detective when asked what the bundle Franks was carrying was wrapped in, replied that he was not sure, but that it looked like sacking.]

Had the appellant been defended by counsel this would have afforded material for cross-examination, and would have shown that the parcels were not similar.

Higgins, for the Crown. There was ample evidence on which the jury could convict; they could properly take into consideration the appellant's conversation with Miller in the charge-room (which could only refer to the stolen property) and his denials in the witness-box. He denied that he had been in the yard or had been carrying a bundle, but his own witness, Norman, ultimately admitted that he had been with him at the yard at 8 p.m. on the Monday night "looking at the stuff," and that it was appellant who took him into the yard and shewed him where the barrow was, and that he and appellant were in the yard at 9 a.m. on the Tuesday. The summing up was favourable to him.

The LORD CHIEF JUSTICE: The appellant was convicted of stealing a barrow and 150 pairs of curtains, and was sentenced to two years' imprisonment with hard labour. He was charged with three other men, all four being indicted for the theft. Two were convicted and have not appealed; one was acquitted. The case made for the prosecution against the appellant is that on Tuesday, the 15th December, he was seen coming from a yard in which a barrow with a number of bundles of curtains was found. The curtains had been entrusted to Norman by his master to take to a market for sale. The evidence against the appellant requires to be looked at apart from the evidence against the others. We have to see whether, on the whole, there was sufficient evidence to justify the conviction. The jurisdiction of this Court is not limited merely to ascertaining whether a case had been made in law, but it should be satisfied, notwithstanding that there was in law evidence of the offence, that the evidence was sufficient to justify a conviction.

The evidence is that the appellant was seen leaving the yard with Norman, carrying a large bundle. It is said by the prose-

1915
15 *February.*

NATHAN FRANKS.

Reading L.C.J.

cution that the bundle was identified, by reference to the paper which covered it, as part of the stolen property. There is some doubt whether the witness ever answered the question that was put to him on that point. It is difficult to say, I thought that he might be said to have answered it, but it is by no means clear. When we examine the depositions it appears that the detective at the police-court said that he thought the parcel which he saw the appellant carrying was covered with sacking, but he was not positive. Contrasting that evidence with the evidence given at the trial, if we assume that he identified the wrapping as being paper, it is odd that he should have been positive at the trial after being doubtful before the magistrate, and thinking then it was sacking. The whole evidence of identity of the stolen property rests on that evidence. The utmost that can be said is that it supplemented evidence of a conversation between Miller and the appellant, which was some evidence against the latter; the judge did not refer to this conversation, but said that the jury must be satisfied that the appellant had some of the stolen property in his possession.

The Court cannot but think that if the appellant had been defended by counsel one of the first questions put to the detective in cross-examination would have been whether he had not said at the police-court that the bundle seemed to have been done up in sacking. Moreover, counsel would certainly have avoided putting questions which elicited the fact of previous convictions. Viewing the evidence for the prosecution in all its bearings, the Court comes to the conclusion that the evidence was not quite sufficient, and that it would be unsafe to convict a person of larceny upon it. It may be that the appellant is very fortunate, but as a matter of justice we have to be satisfied that there was sufficient evidence in the case against the appellant without regard to his antecedent history. The conclusion we have come to is that the evidence just falls short, and therefore the conviction must be quashed.

Conviction quashed.

A. L. B. T.

1915
15 *February.*

HENRY STOCKDALE.

Reading L.C.J.
Bray J.
Shearman J.

The statutory notice to a prisoner charged as a habitual criminal must allege that he has been an associate of thieves in the relevant period, if it is intended to offer evidence of the fact.
Maxfield, 7 *Cr. App. R.* 230 (1912), *followed.*

This was an appeal against conviction as a habitual criminal, by leave of Ridley J. Appellant was convicted, at the Central Criminal Court, on the 18th September, 1914, before the Common Serjeant, of larceny and of being a habitual criminal, and was sentenced to four years' penal servitude and five years' preventive detention.

L. Morgan May for the appellant (under s. 10 of the Criminal Appeal Act) who was present. Evidence was given that since his last release from prison the appellant had been an associate of thieves; there was nothing in the statutory notice to justify this evidence. Only three grounds were there alleged: one, his previous convictions; the second, this larceny (the primary charge); the third was, "That between the 18th day of February and the 10th day of August, 1914, you made no genuine effort to obtain honest employment." This evidence must have been prejudicial to him, and great care to avoid anything prejudicial to the prisoner is required in such cases; see *Neilson*, 78 J. P. 158; 30 T. L. R. 125; 9 Cr. App. R. 218 (1913).

Beaufoi Moore, for the Crown. There was an interval of six months between the appellant's release from prison and the commission of the larceny; he did not give a satisfactory explanation of what work he had done in the time, and in that case evidence of his mode of life is admissible. He said he had been in hospital part of the time; there was no evidence of that at the trial, but I understand inquiries have shown that it was the case. There was no miscarriage of justice; the appellant had fifteen previous convictions, and had on three occasions been sentenced to penal servitude. See *Westwood*, 77 J. P. 379; 29 T. L. R. 492; 8 Cr. App. R. 273 (1913); *Heron*, 9 Cr. App. R. 29 (1913); and *Summers*, 10 Cr. App. R. 11 (1914).

1915
15 *February.*

HENRY STOCKDALE.

Bray J.

BRAY J.: The appellant was convicted of larceny, for which he was sentenced to four years' penal servitude. He was then tried and convicted of being a habitual criminal, for which he was sentenced to five years' preventive detention. No question arises on the first conviction, but a question does arise on the conviction as a habitual criminal. There can be no doubt that evidence was wrongly admitted. One sees how it happened; we all know that the Common Serjeant tries cases most carefully, but his attention was never called to the notice when this evidence was given. It remains for us to consider whether the Crown has satisfied us that there has been no substantial miscarriage of justice within the proviso to s. 4 of the Criminal Appeal Act. That must depend on the facts of the individual case. The principle has been laid down on which the Court has to deal with such cases. In *Neilson*, which was a similar case to this, the Lord Chief Justice said, "One must bear in mind what has been said on several occasions lately, that the most watchful care must be exercised in trying these cases and in directing the jury when trying them; for a prisoner who is being tried as a habitual criminal has just been convicted before the same jury of another offence. Although, when one looks at the appellant's record it is almost certain that the jury would have come to the same conclusion, we cannot say that they would have done so if this evidence had not been admitted." We must see what the facts are. No doubt there are a large number of convictions against the appellant but we note in the first place a gap of some four years, between 1908 and 1911, when he was at liberty, and when there are no convictions against him. It was in evidence that he did work for a short period between the 18th February and the 10th August, which is the important period here. The appellant's case is that he was attending a hospital for a large portion of the time, during part of which he was an in-patient. Those facts were unfortunately not brought out at the trial, but there is no doubt of their accuracy. On the 27th March he attended as an out-patient for an injury to his hand, and in June it was apparently so much worse that he became an in-patient at another hospital. There were, therefore, reasons why he was unable to work, and a fairly satisfactory explanation of the time in question.

We must look at the nature of the evidence which was wrongly admitted: if it was of very small importance we might say that

1915
15th *February.*

HENRY STOCKDALE.

Bray J.

there had been no miscarriage of justice. But it was very strong evidence, that he had associated with men who had been very often convicted, and it was referred to in his summing-up by the Common Serjeant, who said: "I cannot find out that he has done any honest work, and he has been consorting with criminals." Having regard to all the circumstances, it seems to the Court impossible to say that the jury would have come to the same conclusion if the evidence had not been admitted; therefore the conviction as a habitual criminal must be quashed.

Conviction as a habitual criminal quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROWLATT, AND MR. JUSTICE SHEARMAN.

ARTHUR DENNISON LIGHT.

1915
22 *February.*

The offence of attempting to obtain by false pretences may be committed although the person to whom the pretences were made knew that they were false. Hensler, 11 *Cox C. C.* 570; (1870), *C. C. R. confirmed* (a).

Appeal against conviction on a point of law.

The appellant was convicted before the Recorder, at the Central Criminal Court, on January 20th, 1915, of attempting to obtain money by false pretences, and was sentenced to three months' imprisonment in the second division.

Chas. Doughty for the appellant. The appellant was charged on an indictment containing five counts. On the first, second, and fourth counts he was acquitted, but was found guilty on the other two, namely, the third and the fifth. The third count charged him with attempting to obtain £1 1*s.* from one Gibbin with intent to defraud by means of certain false pretences, while the fifth alleged a similar attempt to obtain £1 11*s.* 6*d.* from one Wagstaff.

In 1914 the appellant, who described himself as the principal of the "British Health Institute," held himself out through the medium of advertisements as having "made arrangements to test the urine of those who so desire for a nominal fee of 1*s.* 6*d.*" This advertisement came to the notice of Gibbin, who, suspecting the qualifications of the appellant to make such a test, obtained from

(a) Cf. *Laitwood*, 4 Cr. App. R. 248 (1910).

1915
22 *February.*

ARTHUR DENNISON LIGHT.

Reading L.C.J.
Rowlatt J.
Shearman J.

a friend a bottle containing a solution of water coloured with potassium dichromate and Bismark brown with a small quantity of soap. This he forwarded to the appellant, requesting him to "analyse his water." Subsequently, he received a letter from the appellant advising "a course of tonic treatment in your case. An eight weeks' course would only cost you one guinea"; and adding, "I should like to have another sample of urine after you have been under treatment one month." Similar facts occurred in the case of Wagstaff, the fee for the treatment recommended in his case being £1 10*s.* 6*d.* As a result, proceedings were instituted with the result stated above.

The conviction of the appellant ought not to stand. First, the Recorder in his summing up failed to give a sufficient direction to the jury, and, secondly, the evidence did not establish in law the offence of attempting to obtain money by false pretences. It is an essential element of this offence that the mind of the person to whom the false pretences are made should be affected thereby. Here the minds of neither Gibbin nor Wagstaff were so affected. On the other hand, they entered into communication with the defendant because their suspicions had been aroused by his advertisement.

The present case is distinguished from *Ady*, 7 C. & P. 140 (1835); *Roebuck*, 7 Cox C. C. 126; 25 L. J. M. C. 101; 2 Jur. N. S. 597 (1856); and *Hensler*, 11 Cox C. C. 570; 22 L. T. 691 (1870).

It is a condition precedent to a conviction for obtaining goods or money by false pretences that the mind of the prosecutor should be affected thereby. It seems to follow that the same principle is to be applied where the prisoner is only charged with the attempt; *Mills*, 7 Cox C. C. 263; 26 L. J. M. C. 79; 3 Jur. N. S. 447 (1857).

The case of *Button*, 2 Q. B. 597; 69 L. J. Q. B. 901; 19 Cox C. C. 568 (1900), is a real instance of this "attempt." The difference between that case and the present is that here there was no possibility of the appellant obtaining the money by false pretences as neither Gibbin nor Wagstaff were deceived thereby; whereas Button would have undoubtedly received the prizes if he had persevered in his deceit.

He referred to the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 9,

1915
22 *February.*

ARTHUR DENNISON LIGHT.

Rowlatt J.

R. D. Muir, for the respondents, the City police, was not called upon.

ROWLATT J.: We are of opinion that this appeal fails. I will deal with the point of law first. It was said that on a charge of attempting to obtain money by false pretences the fact that the prosecutor does not believe the false pretences renders a conviction impossible. It is abundantly clear that a person cannot be convicted of the offence of obtaining goods or money by false pretences unless the mind of the prosecutor has been misled by the false pretences, and he has been induced to part with his property thereby. But in our judgment it is a complete fallacy to suppose that the same principle has any application in the case of an attempt only. The false pretences are made by the prisoner with the intention of obtaining money thereby. He employs the false pretences in an endeavour to get money. Possibly the prosecutor disbelieves the false statements and does not give the prisoner money; or possibly he sends the prisoner money with the intention of carrying the matter further. In either case, the prisoner has made false pretences, intending thereby to get money, and he has failed because the prosecutor has not been misled, as was attempted. It seems to us there is no difficulty in holding in these circumstances that a prisoner is guilty of an attempt to obtain money or property by false pretences. The question is really not an open one. The point passed *sub silentio*, as if too clear for argument, in *R.* v. *Roebuck*, where the Court, not for the first time, examined this subject, and was determined precisely in *R.* v. *Hensler*.

In regard to the other point in this case, we are of opinion that the summing up of the case to the jury by the Recorder cannot be attacked on the grounds advanced by counsel for the appellant.

For these reasons this appeal must be dismissed.

Appeal dismissed.

Solicitors—*Sewell, Edwards and Nevill* for the appellant; *The City Solicitor* for the respondents.

G. F. L. B.

1915
22 *February.*

Reading
L.C.J.
Rowlatt J.
Shearman J.

LEONARD VEALE.

Severity of sentence.

A sentence of imprisonment with hard labour should not be passed to run consecutively to one of penal servitude.

Appeal against sentence.

The appellant was convicted, before the Deputy-Chairman, at the Durham Sessions, on January 4th, 1915, of obtaining goods by false pretences, and was sentenced to twelve months' imprisonment with hard labour, to run consecutively to a previous sentence of three years' penal servitude.

On June 27th, 1914, appellant went to the house of one Mrs. Elizabeth Ann Webster at Darlington and requested a bed for the night. This he paid for. Next morning he asked for some breakfast, saying that he was a horse and cattle dealer and commission agent and that he had a cheque in his pocket for £30, which he was going to get cashed, and that he would then pay for the food and drink. Relying on this story, Mrs. Webster continued to supply the appellant with meals until July 1st, when he left the house and did not return. On October 22nd, 1914, he was convicted on a charge of false pretences at Northallerton, and was sentenced to three years' penal servitude.

The *appellant* in person.

C. Paley Scott for the Crown.

Lord Reading, C.J.: We are of opinion that sentences of imprisonment with hard labour should not be passed to run consecutively to sentences of penal servitude. As in this case such a sentence has been passed, the Court must consider it. If the matter had been dealt with by a concurrent term of penal servitude the effect would have been that the prisoner would have had to serve a somewhat longer term of penal servitude, but certainly not so long as an additional twelve months. We are not disposed to alter the sentence of twelve months' imprisonment to one of penal servitude, even though it would in this case only involve a short further period of penal servitude. Although the offence com-

1915
22 *February.*

LEONARD VEALE.

Reading L.C.J.

mitted by the appellant was one which justly merited a sentence of imprisonment with hard labour if no other sentence for another offence had been passed upon him, we are of opinion that, taking into account the penal servitude which he already had to undergo, the right course for us to pursue is to reduce the sentence of twelve months' imprisonment with hard labour to that of one day's

Sentence reduced.

G. F. L. B.

MORRIS MYERS.

Severity of sentence.

The Court inclines to making a first sentence of penal servitude one for a term of three years.

Appeal against sentence.

The appellant was convicted, before the Deputy-Chairman, at the County of London Sessions, on February 4th, 1915, of larceny from the person, and was sentenced to five years' penal servitude.

The property stolen was a sum of money and a diamond ring. He stated in evidence that the prosecutor gave him these articles after attempting to commit an unnatural act with him. He had previously been convicted on four occasions and sentenced to one, two, six, and fifteen months' imprisonment with hard labour.

The *appellant* in person.

A. P. Poley for the Crown.

SHEARMAN, J.: In this case the appellant was charged with larceny from the person, and the charge was fully proved against him. He set up the defence that the property which was the subject matter of the charge was given him in scandalous circumstances. The setting up of that defence did not redound to his credit, and does not conduce to his sentence being mitigated. At the trial the jury rejected his story, and he was convicted. When he had been convicted, the learned Deputy-Chairman had these

1915
22 *February.*

MORRIS MYERS.

Shearman J.

previous convictions to deal with. The appellant was convicted in 1909 for stealing and was sentenced to one month's imprisonment with hard labour. On another occasion in the same year he was sentenced to two months' for loitering, and in 1911 to six months' imprisonment for a more serious offence. In 1913 he committed a very serious robbery with violence on an old man and was sentenced to fifteen months' imprisonment with hard labour. He had now committed another robbery, and had aggravated his offence by putting up a scandalous charge against the prosecutor. It was obviously a case for a sentence of penal servitude. The Court, however, think that as a first sentence of penal servitude it is too severe, and consider that it should be reduced to one of three years.

Sentence reduced.

G. F. L. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE ROWLATT.

HERBERT BALDWIN HAMPTON.

1915
1 *March.*

On a trial for larceny as a servant of a cheque, it is a misdirection not to distinguish between the instrument and the proceeds thereof.

The attention of the jury should be drawn to the specific facts that they must find in order to convict.

This was an appeal against conviction on points of law, and an application for leave to appeal against sentence. Appellant was convicted at the Folkestone Borough Sessions, on the 25th January, 1915, of larceny as a servant, and was sentenced to twelve months' imprisonment with hard labour.

Newbolt, K.C. (with him *T. Rowand Harker*), for the appellant, who was present. The appellant was the manager of the Pleasure Gardens Company, Ltd., and he was convicted of stealing three cheques, the property of that company. Two of these cheques were drawn for wages and one for petty cash; they were made payable to the appellant, in two of the cheques the purpose for which the cheque was drawn being expressed on the face. These cheques were paid by the appellant into his own banking account. The explanation he gave was that he often had to make payments late on a Saturday night when it was not always possible to get the signature of a director to a cheque, and for this reason a system had been adopted, with the approval of the directors, by which the appellant paid these amounts himself out of his own banking account, afterwards recouping himself by cheques drawn by the company; he said that the three cheques in question were paid into his account under this system to repay him for payments which he had already made out of his own pocket.

1915
1 *March.*

HERBERT BALDWIN HAMPTON.

Reading L.C.J.
Avory J.
Rowlatt J.

Considerable importance was attached at the trial to a cheque for £135 15*s.* 4*d.* which was paid into his account. The appellant's explanation was that on the 20th November, 1913, Lady Bancroft was owed this amount in respect of a charity performance in which she was interested, and it being his duty to pay her he did so with his own cheque. On the same day, a cheque on the company's account for the same amount was drawn in his favour; he endorsed it and gave it to Wood, a servant of the company, to pay into his account, but Wood by mistake paid it into the company's account. A second cheque was therefore drawn and paid into the appellant's account. Although the evidence of the prosecution bore out this explanation, Wood's mistake was referred to by counsel for the Crown as a clever trick of the appellant.

The audit in January, 1914, shewed a shortage of £170 1*s.* 5*d.*, which was said to be due from the appellant, though it was never admitted to be a defalcation. He, however, paid this sum to the company by a cheque for £170 1*s.* 5*d.* drawn on his own account. He was, after some months, charged with the larceny of this sum and the embezzlement of three cheques. All these charges were dismissed or withdrawn, and he was committed to trial for the larceny of three different cheques. The alleged deficiency of £170 was eventually reduced to £140 as it was found there had been an error of £30. The three cheques with regard to which he was charged were for £10, £40, and £12, and were included in a sum of £221 17*s.* 10*d.* which he paid into his account on the 21st January, 1914. With regard to the cheques for wages, no evidence was given that the wages were not payable or had not been paid, and with regard to the cheque for petty cash, the evidence for the prosecution shewed that the proceeds were fully and properly paid to Wood for petty cash.

The summing up contained misdirections which were most likely to mislead the jury. The Recorder said: "You have to decide whether his dealings with the company were felonious"; from this the jury would have inferred that if they thought on the facts that the appellant had misappropriated moneys of the company they should convict him of stealing the cheques. The appellant was really tried for misappropriating the moneys of his employers at large, and their attention was never directed to the fact that the charge was only that of stealing the cheques, and

1915
1 *March.*

HERBERT BALDWIN HAMPTON.

Reading L.C.J.
Avory J.
Rowlatt J.

not the proceeds. The Recorder also failed to put before the jury points and evidence which told in the appellant's favour.

The appellant being the payee could not be guilty of larceny of the cheques; there cannot be a felonious taking by a payee. See *Sullens*, 1 Moo. C. C. 129; Carrington's Supplement, 319 (1826); and *Walsh*, R. & R. 215; 2 Leach, C. C. 1054; 4 Taunt. 258 (1812).

Lastly, the appellant was asked questions in cross-examination which tended to shew that he had committed an offence other than that with which he was charged. These questions were objected to by his counsel, but admitted by the Recorder. He had left a situation in Scarborough in debt to his employers, and he was asked, "You made the same sort of mistake there as you say you made here?"; this could only mean that both were felonies. This was contrary to the law laid down in *Ellis*, [1910] 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 22 Cox, C. C. 330; 26 T. L. R. 535; 3 Cr. App. R. 41; and *Fisher*, [1910] 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176.

Hume Williams, K.C. (with him *T. Mathew* and *Cassels*), for the Crown.

[The LORD CHIEF JUSTICE: We wish to hear you with regard to the summing up. Throughout the trial the Recorder treated the case as one of the misappropriation of the proceeds of the cheques, and did not draw the attention of the jury to the specific charge, which was that of larceny of the cheques.]

The summing up cannot be properly appreciated unless the course of the case and of the defence is realised. The case for the prosecution was that the appellant for eight months after being appointed manager paid all amounts due from the company by means of the company's cheques. It then became necessary for him to put himself in funds to meet private liabilities. He therefore secretly opened a private account and paid into it without authority funds belonging to the company for the purpose of paying his private debts. For the defence it was suggested that he had authority, and the fraudulent intent could only be proved

1915
1 *March.*

HERBERT BALDWIN HAMPTON.

Reading L.C.J. Avory J. Rowlatt J.

by the course of dealing. He had to keep a monthly summary of daily receipts; his duty was to pay all receipts into the bank, and at the end of the year the payments to the bank should tally with the total receipts. The accounts at the end of the year shewed a shortage of £170 odd, and the auditors refused to sign the accounts unless the appellant repaid this sum. He gave his own cheque to meet this amount, but had only £4 to his credit at the time. In order that the £170 cheque might be met he took the three cheques, the subjects of the charge, and paid them into his account although two of them were marked "Band and Wages" and should have been cashed and paid according to that direction. His case as to the three cheques with regard to which he was charged was that he had already spent the proceeds for the purposes of the company, and was entitled to repay himself. It therefore became material to see what happened to the proceeds. The Recorder at the very beginning of his summing up told the jury that he was charged with stealing the three cheques, and towards the end he again reminded them of this fact; the jury cannot have been misled because, after pointing this out, he proceeded to deal with the way in which the case for the defence had been presented during a trial which lasted two days, namely, that there had been no felonious intent. *Oxenham*, 13 Cox C. C. 349; 46 L. J. M. C. 125; 35 L. T. 490 (1876); C. C. R.; and *Metcalfe*, 1 Moo. C. C. 433 (1835), are in my favour.

[As the Court stated that it was in favour of the appellant on this point counsel for the Crown did not deal with the other matters raised.]

The LORD CHIEF JUSTICE: The appellant was convicted on indictment of larceny, as a clerk or servant, of three cheques, the property of his employers, and he was sentenced to twelve months' imprisonment with hard labour. He appeals against his conviction on points of law, and applies also for leave to appeal against his sentence.

The case presented against him is that he was employed as manager at Folkestone of the Pleasure Gardens Company, Ltd., and it was part of his duty to pay all moneys received on behalf of the company into the National Provincial Bank, where the company had an account. He received three cheques drawn on

1915
1 *March.*

HERBERT BALDWIN HAMPTON.

Reading L.C.J.

the company's banking account at the beginning of 1914 which he should have cashed over the counter at the bank, and with the proceeds he should have discharged certain liabilities of the company. The cheques were made out to him, but in two cases to "Hampton, wages," and "Hampton, band and wages." All were to "order." Instead of cashing these cheques over the counter, he paid them into his own account at another branch of the same bank; and the defence raised was that some months after he had been appointed manager he opened the account because he found difficulty in getting a director to sign a cheque late at night. In the ordinary course of business cash was received on account of theatrical companies and the person entitled to it often required payment on the last night of the performance, and it was sometimes as late as 9.30 p.m. before the amount due could be ascertained. So the practice was resorted to by the appellant of drawing cheques on his own account and recouping himself in account with the company.

A great deal of discussion, both at the trial and here, has been directed to the events relating to a sum of £135 which formed a central feature of the case for the prosecution. In substance, what happened was that at the end of 1913 there was a deficiency of £170 1*s*. 5*d*., comparing the amounts received by the appellant with those paid into the company's banking account. Of that sum, £135 15*s*. 4*d*. was the repayment of a sum paid to Lady Bancroft in respect of a charitable entertainment in which she was interested. It appears that the appellant signed the balance sheet of the company and had to make good the deficit; he drew a cheque for £170 1*s*. 5*d*. in favour of the company, but in order to meet it he paid £221 into his own account made up of seven cheques, three of which were the subject of the indictment. The case for the prosecution was that he had stolen the three cheques, and had converted them into money to meet the deficiency. It is sufficient to say that on examination of a document put in evidence, called a monthly summary of daily receipts, it is abundantly clear that the appellant did not pay money into the company's account as it was received, and that any inspection of the accounts must have shewn that he did not do so. The account proves that in respect of Lady Bancroft's performance over £198 was received and only £150 was paid in. It is further shewn then that, according to the accounts, he did not in practice

1915
1 *March.*

HERBERT BALDWIN HAMPTON.

Reading L.C.J.

pay in specific amounts as they were received, but ran a kind of account against the company and paid in from time to time.

In his direction to the jury, the Recorder stated his view as to the essentials of the offence, and it was necessary that he should draw attention to them. He says at the beginning, in the sentence which is most relied upon by the prosecution, "The prisoner stands before you charged by the Crown with having feloniously, that is fraudulently, stolen three cheques of £10, £40, and £12, the property of his masters. It is incumbent upon the Crown to satisfy you as reasonable men, having reasonable intelligence, that the prisoner did intend and did deprive fraudulently his employers of these three sums, and if you should be of opinion that the Crown has satisfied you as to that, then, gentlemen, your verdict will be a verdict of 'Guilty' against this man, no matter what the consequences may be." It must be obvious that on such a direction the jury may well have thought that if they were satisfied that the appellant, notwithstanding that they believed his statement as to the practice to pay the company's cheques into his own banking account, had dealt fraudulently with the proceeds of the cheques, they might convict him. If that was their view, it was wrong in law, as he could not be convicted of stealing unless he had knowingly converted the cheques themselves. No such direction was given here. Our attention has been drawn to the case of *Oxenham*, in which a similar point was discussed, and the direction given came before the Court for discussion. It is plain that the decision in that case is in accordance with the view the Court has expressed of the proper direction to the jury. If such a direction had been given in this case it would be a totally different matter. If the Recorder had told the jury that they must acquit unless they found that the appellant had knowingly converted the cheques themselves there could be no question as to his summing up, but the difficulty is that there is no such direction. The Recorder seems to have left it to the jury as if the real question to be determined was whether the appellant's conduct was honest or dishonest. That is not the way in which a case of this kind ought to be left to the jury. The appellant was indicted for specific offences. No doubt in the course of the case there was a good deal of discussion on the intention of the appellant with regard to the proceeds of the cheques, and it may be and no doubt is the fact that the attention of the

1915
1 *March.*

HERBERT BALDWIN HAMPTON.

Reading L.C.J.

Recorder was diverted by this discussion. The guilt or innocence of the appellant depended largely on the practice that prevailed. If the jury had been told that it might well be that he converted the proceeds, but nevertheless that if the practice existed of drawing the cheques and paying them into his own account, he could not be convicted of larceny, the Court cannot say that the jury must have convicted him.

The Court thinks that there was an essential fault in the summing up, and in the opinion of the Court when a judge directs a jury, especially in a case which is of some complexity and is by no means clear, he should draw the attention of the jury to such facts as it would be for them to find before they could convict. If the facts are right as put before us, this seems to be just one of those cases which led to the passing of the Larceny Act, 1901, and dealing with the cheques in the fraudulent way suggested would be an offence within that Act; but it is not the offence charged. In our opinion the conviction must be quashed.

Conviction quashed.

Solicitor for the Appellant—*W. J. Wenham.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY AND MR. JUSTICE LUSH.

1915
15 *March.*

HARRY ROBINSON.

An indictment for an attempt to commit a crime must be proved by acts immediately (and not remotely) connected with the crime.

Eagleton (24 *L. J. M. C.* 158; 1885), *followed.*

This was an appeal against conviction on questions of law. The appellant was convicted, at the Manchester Assizes, before A. T. Lawrence J., on the 18th February, 1915, of attempting to obtain money by false pretences, and was sentenced to six months' imprisonment.

Gordon Hewart, K.C. (with him *McCleary*), for the appellant, who was present. The appellant was a jeweller in Oldham, and he had incurred losses owing to the war. He was insured against burglary at Lloyds, and on the 11th December, 1914, he attempted to shew that a burglary had been committed at his premises. Early in the morning a police-sergeant, named Hodgkinson, heard moaning in the appellant's shop, and found the appellant in the shop tied up; he said that his premises had been broken into, himself injured, and his safe, which had contained a considerable amount of jewellery, robbed. He was taken to the police-station, and in his absence other police officers searched the house, and found the jewellery in a recess by the safe. This was reported to the appellant, who at once admitted that he had intended to make a claim upon the underwriters. These facts were not in dispute; the policy was proved, and it was admitted that to obtain the insurance money the appellant would have had to fill up a claim form, after which other enquiries would be made by the under-

writers, and it would only be when they were satisfied that the money would be paid.

My submission is that the appellant was stopped at such an early stage of his scheme that he had not yet committed any crime. There is a difference between preparation to commit a crime and an attempt to commit a crime; moreover, when the stage of mere preparation has been passed, it is necessary to see whether the act relied on by the prosecution is sufficiently proximate to the principal crime to amount to an attempt. If something material remains to be done on the part of the accused he cannot be convicted of an attempt to commit a crime. In *Eagleton*, 24 L. J. M. C. 158; Dears. C. C. 515; 3 C. L. R. 1145; 1 Jur. (N. S.) 940; 4 W. R. 17; 6 Cox C. C. 559; (1855), it was held that the making of the false pretence relied on was an act done with the intent of obtaining the money, and was sufficiently proximate to the obtaining it to be considered an attempt to obtain it, because no other act remained to be done by the prisoner to entitle him to receive it. Parke B., in giving the judgment of the Court, said: "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think all acts towards committing a misdemeanour indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." Here the appellant never got into touch with the insurers, nor with any agent or representative of the insurers, and there were many places of repentance open to him before he sent in a fraudulent claim. He was doing no more than making preparations which might afterwards be of use to him if and when he should attempt to obtain the money.

In *Roberts*, 25 L. J. M. C. 17; Dears. C. C. 539; 1 Jur. (N. S.) 1094; 7 Cox C. C. 39; (1855), where the prisoner procured dies for making counterfeit coin, but was apprehended before he had obtained the metal and chemical preparations necessary, it was held that the procuring of the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence intended, and sufficiently evidencing the criminal intent, to support an indictment founded on it for a misdemeanour, that is for the offence of making dies with the intent to make counterfeit coin, although the same facts would not have supported an indictment for attempting to make counterfeit coin.

1915
15 *March.*
HARRY ROBINSON.
Reading L.C.J.
Bray J.
Lush J.

Button, [1900] 2 Q. B. 597; 69 L. J. Q. B. 901; 83 L. T. 288; 48 W. R. 703; 19 Cox C. C. 568; 64 J. P. 600; C. C. R., was the case relied upon by the prosecution at the trial, but I submit that on a true construction it is in the appellant's favour. In that case the prisoner by false pretences was given a more favourable handicap in a race than he would have received otherwise, and it was argued that although he won the race he did not claim the prize; Wright J. said: "If nothing more had been shewn than that the defendant had entered for the races in a false name, the case would have been different. If he did not run or claim the prize it would be difficult to say that there was an actual attempt to obtain it. But here, in effect, he did claim the prize." The prisoner, by his conduct and by means of falsehoods to the official handicapper, had done all he could. Nothing remained to be done there, but here the appellant was only paving the way for making a claim in the future.

Further, the indictment alleged that by means of false pretences made to Sergeant Hodgkinson the appellant attempted to obtain money from the insurance brokers with intent to defraud. There is a manifest *hiatus* on the face of the indictment, as no relationship existed between the police officer and the underwriters.

My submission is twofold:—(1) That in this case the accused had not passed the stage of preparation; and (2) that, if the Court should hold that he had passed that stage, nevertheless the acts which he did were too remote from the principal crime to constitute an attempt to commit it. It is as if an unmarried man, being resolved to commit bigamy, married the first woman, and there paused, and never proposed marriage to the second woman. Upon those facts he could not be convicted of an attempt to commit bigamy.

Bodkin (with him *Jordan*), for the Crown. The following is the definition of "attempts" given in Stephen's Digest of the Criminal Law, 5th ed., p. 39, Art. 50: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case." It follows that it is not of much assistance here to cite cases. That definition was

1915
15 *March.*

HARRY ROBINSON.

Reading L.C.J.
Bray J.
Lush J.

approved of in *Laitwood*, 4 Cr. App. R. 248 (1910). The offence of obtaining money by false pretences is a composite offence, and if any act is done which constitutes one of the necessary elements that amounts to an attempt. The false representations need not be made to the person from whom the money is to be obtained. Here the appellant completed the creation of the false pretences, and he clearly contemplated that the police would come in and report on the matter. The construction of a bogus burglary was itself a making of false pretences, made with the fraudulent intention of getting money thereby, and that is sufficient to support a conviction.

Roberts is in my favour. Jervis C. J. said, according to the report in Dearsley C. C.: "Nobody can doubt that the prisoner was in possession of machinery necessarily connected with the offence, for the express purpose of committing it, and which was obtained and could be used for no other purpose." The indictment is set out in full in that report, and it shews that the prisoner was convicted of attempting to make counterfeit coin. "The question in each case is whether the acts relied on as constituting the attempt were done with intent to commit the complete offence, and as one or more of a series of acts or omissions directly forming some of the necessary steps towards completing that offence, but falling short of completion by the intervention of causes outside the volition of the accused, or because the offender of his own free will desisted from completion of his criminal purpose for some reason other than mere change of mind." Russell on Crimes, 7th ed., p. 143.

[BRAY J.: That is surely too broad.]

In *White*, (1910) 2 K. B. 124; 79 L. J. K. B. 854; 102 L. T. 784; 64 J. P. 318; 54 S. J. 523; 26 T. L.R. 466; 4 Cr. App. R. 257, the prisoner was convicted of an attempt to murder, although further acts had to be done by him before the person could have been killed. Bray J. said: "We are of opinion . . . that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder, even although this completed act would not, unless followed by the other acts, result in killing." *Dugdale*, Dears. C. C. 64 (1852), is also in my favour.

1915
15 *March.*

HARRY ROBINSON.

Reading
L.C.J.
Bray J.
Lush J.

Gordon Hewart, K.C. Although an attempt implies the intent, an intent does not necessarily imply an attempt. *Linneker*, (1906) 2 K. B. 99; 75 L. J. K. B. 385; 94 L. T. 856; 54 W. R. 494; 70 J. P. 293; 21 Cox C. C. 196; 22 T. L. R. 495; C. C. R., *per* Kennedy J., and Walton J. said: "It is clear that all acts done for the purpose of committing a crime are not attempts, for they may be merely acts of preparation." The definition suggested ignores that distinction.

Bodkin. *Linneker* is commented on in *White*, so far as the judgment of Kennedy J. is concerned.

The LORD CHIEF JUSTICE: The appellant was convicted of attempting to obtain £1,200 by false pretences from Lloyds' underwriters, and was sentenced to six months' imprisonment. He appeals to this Court on a question of law. The question of law involved depends on a clear view of the facts of the case, as to which there is very little room for dispute. The appellant is a jeweller carrying on business at Oldham. He had insured his stock with underwriters at Lloyds against theft, burglary and damage consequent thereupon. A policy was issued covering these risks in November, 1914. On the morning of the 11th December a police officer passing his shop heard a noise and someone crying, "Open the door, I am bound." He burst open the door and found the appellant with his ankles bound with string, one wrist tied and the other free, and an apron tied round his neck. He informed the police officer that he had put all his jewellery in the safe, which he had locked and then had gone upstairs, when he received a blow on the back of the head; also that the watch he was wearing had been taken from him. The safe was found open with nothing in it, though he said there had been jewellery worth £1,500 in it. The policeman was not satisfied, and took him to the police-station; meanwhile other police officers searched the premises and found underneath the safe in a recess all the jewellery, and the appellant's watch. They told the appellant that the jewellery had been discovered, and he then said that times were so bad that he was a long way behind last year's takings, and he had been inspired by the generous way in which the underwriters had paid his claim arising from a previous burglary to think of getting money from them in this way.

1915
15 *March.*

HARRY ROBINSON.

Reading L.C.J.

There is no doubt on those facts (and the appellant did not dispute the fraudulent device) that the object was that they should be used in the future to enable him to obtain money under his policy from the underwriters. The only question in this case is whether, whatever his intention may have been, the police having prevented his going further and taking any other steps towards committing the crime, the offence of attempting to obtain money by false pretences had been committed. There is no doubt that if a claim had been made, or if any step had been taken towards communicating the news of the burglary to the underwriters with a view to making a claim on them, the appellant could have been convicted of the offence. At the trial the point of law was taken that on the facts there was not sufficient to convict him. The judge treated the case as if there were sufficient facts, and in the result the appellant was convicted.

It seems to this Court on consideration of the authorities cited, although there is some difference in the language used in the various cases, that there is no real difficulty in formulating the principle to be applied. The safe guide is that laid down by Parke B., in *Eagleton;* he says: "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think all acts towards committing a misdemeanour indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." The difficulty that arises, and which has led to a considerable difference of language in the later cases, is in applying this principle to the particular facts of the case. Some cases are very close to the line, while others are very easy of solution, as were *Roberts* and *Button,* in the last of which undoubtedly pretences were made, and made to induce the authorities to give the prisoner the prize. Now in this case the difficulty is that there is no evidence of any act done by the appellant which ever reached the underwriters. They were the people whose minds were to be affected and who were to be induced to part with their money. There is no evidence of any communication between the appellant and the underwriters or any agent of theirs; the policeman cannot be said to have been acting for the underwriters. The truth is that this was preparation of evidence for the commission of the crime, and not a step taken with a view

1915
15 *March.*
HARRY ROBINSON.
Reading L.C.J.

to the commission of the crime. Appellant was preparing the evidence that would be required to give colour to the story which he intended falsely to pretend. If the police had reported the burglary it might well have been that the underwriters would have been satisfied without making further enquiries, but there must have been first some act on the part of the appellant in making a claim upon them. It is there that we think the case fails, and applying the principle of Parke B., we think it was an act remotely leading to the commission of the offence, and not an act immediately connected with it. It is important to bear in mind that if we held otherwise we should be going further than any case has yet proceeded, and should be opening the door to convictions in a number of cases for acts which do not at present by themselves constitute crimes. As there was no communication between the appellant and the underwriters, or any person on their behalf, we cannot say that there was any attempt to obtain the money, and therefore the conviction must be quashed. We do not decide the case on any technical grounds of facts, but by application of the principle of law to the facts; we have arrived at our conclusion not merely because there was no written claim, but because there was no communication of any kind.

Conviction quashed.

Solicitors for the appellant—*Meason & Nicholson,* Oldham.

A. L. B. T.

THOMAS CHARLES HOLMES AND GEORGE GREGORY.

When stolen goods are found in part of a house sublet by the occupier, the alleged possession of the occupier must be strictly proved.

The fact that stolen goods are bought at an undervalue is not conclusive proof of guilty knowledge; it should be left with the other facts to the jury.

These were appeals against conviction, by leave of Rowlatt J. Appellants were convicted, on the 16th February, 1915, at the County of London Sessions, before the Deputy-Chairman, of feloniously receiving stolen property, and on the 17th February were released under the Probation Act.

1915
15 *March.*

THOMAS CHARLES HOLMES AND GEORGE GREGORY.

Reading L.C.J.
Bray J.
Lush J.

Purcell for appellant Holmes, who was present. Although the appellants were released on probation they wish to clear their characters. The property in question was stolen on the 25th January, and on the 1st February police officers found the stolen property, consisting of rackets, tennis balls, and a mackintosh rug, and a quantity of other property not proved to have been stolen, in a room in Holmes's house, which had been let by him to Gregory. On Holmes's return, a police officer, holding one of several coats in his hand, which were not part of the property mentioned in the indictment, nor proved to have been stolen, asked him how he accounted for the property. According to the evidence of the police officer, Holmes said, "I wish I had never seen the man; I bought them from Gregory; he rents this room from me." Afterwards he admitted that Holmes might have said, "I bought them for Gregory," and that something was said by him about lending Gregory money.

At the close of the case for the prosecution, I submitted that there was no evidence of possession by Holmes of the stolen property, but the Deputy-Chairman said that if the jury believed the evidence as to the statement by Holmes, it was evidence of possession. It was by no means clear what he did say, nor that his remark applied to the property which was the subject of the charge. (He was stopped.)

Wickham for appellant Gregory, who was present. Gregory's explanation was that he bought the goods at the Caledonian Market for £3 10*s*.; and he called a witness to corroborate this; the Deputy-Chairman directed the jury that buying in the Caledonian Market at half the original price could only be buying with a guilty knowledge. This was a misdirection, as practically all goods sold there are bought at much less than their original price. Further, the Deputy-Chairman directed the jury that Gregory, having been out on bail, had seen the witness Manser, at whose stall the goods bought by Gregory were left for a time, and it was for the jury, therefore, to say if they would accept Manser's statement, thereby directing the jury that there was evidence that Gregory and the witness Manser had both met and spoken since the arrest, there being in fact no such evidence, and directing the jury that, owing to such alleged meeting, it could be legally inferred, notwithstanding the fact that Manser

1915
15 *March*.

THOMAS CHARLES HOLMES AND GEORGE GREGORY.

Reading L.C.J.
Bray J.
Lush J.

had not been cross-examined, and was a man of good character, whose veracity had in no way been impugned, that he had conspired with Gregory for no proved reason to commit wilful and corrupt perjury with him, Gregory also being a man of good character. I was taken by surprise, and was prevented from calling witnesses as to Manser's character, as I had the right to do if his veracity had been properly called in question. *Clark*, 2 Starkie, 241 (1817). He also failed to direct the jury properly as to the *onus* of proof in accordance with the decision in *Schama and Abramovitch*, 11 Cr. App. R. 45; 31 T. L. R. 88 (1914).

Metcalfe, for the Crown. With regard to Holmes, even if he said he bought the articles for Gregory it was evidence of possession. It was clear that he was referring to the articles mentioned in the indictment, as I had been particular to tell the witness to confine his evidence to them, from motives of fairness to the appellant.

As to Gregory, articles stolen from three separate parcels were all found in his possession, and he said that he had bought them all from the same man. It was a question for the jury whether they thought his explanation reasonable or not; they found that it was not.

BRAY J.: The appellants were convicted of receiving certain goods, rackets, tennis balls, and a waterproof rug, knowing them to have been stolen. Dealing first with the case of Holmes; the first thing which it was necessary for the prosecution to prove was that the goods were in the possession, or under the control, of Holmes. The evidence was that the police, a week after the goods were stolen, on the 1st February, found in Holmes's house a great quantity of the stolen goods in a room let to Gregory, and then called in Holmes; the evidence against him rested on the admissions which he is said to have made. On this point the police officer at first said that statement was "I bought them from Gregory;" but he afterwards qualified this and admitted that he might have said "I bought them for Gregory," and that Holmes did say something about lending money to Gregory. He also said that Holmes stated "I wish I had never seen the man." Did these statements relate to the rackets or to other goods? It is by no means clear that they did,

1915
15 *March.*

THOMAS CHARLES HOLMES AND GEORGE GREGORY.

Bray J.

as there were other goods to which the police had pointed. The question was left to the jury; it is not necessary that we should say there was no evidence to go to them, but we are clearly of opinion that there was no satisfactory evidence on which Holmes ought to be convicted.

Gregory's case is a different one. He was clearly in possession of the goods, so it was necessary for him to give an explanation of his possession. He did give an explanation that he bought all the goods in one lot at the Caledonian Market; that there was nothing to suggest that they had been stolen; that the price he gave was so much, which amounted to half the original price of the goods. Again it is not necessary to say that the jury were bound to accept that as a reasonable explanation, but it was most unsatisfactory to say that when a man gives an explanation and calls a witness to corroborate it, and there was nothing to shew that his story was unlikely, buying in the Caledonian Market at half the original price could only be buying with a guilty knowledge. It should have been left to the jury as a reasonable explanation. The Deputy-Chairman said that he had bought the goods at an inadequate price. The greater part consisted of lawn tennis balls which were bought at the end of January. Everyone knows that the balls would have been made some months before, and would only fetch a low price; and at the Caledonian Market one expects to buy at a low price. We are clearly of opinion that there was no satisfactory evidence to go to the jury; therefore both convictions must be quashed.

Convictions quashed.

Solicitor for the appellants—*H. Percy Crowe.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LUSH, AND MR. JUSTICE LOW

FREDERICK ERNEST GRUBB.

1915
22 March.

See p. 153, below.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE LUSH.

1915
29 *March.*

WILLIAM HOPPER.

It may be misdirection on the trial of an indictment for murder, when the defence set up is accident, to ignore the alternative of a verdict of manslaughter, whether suggested by the defence or not.

If the Court substitutes that verdict, it may hear fresh evidence, with a view to the quantum *of sentence.*

This was an application for leave to appeal against conviction, and to call further evidence. The appellant was convicted, at the Cardiff Assizes, on the 9th March, 1915, before Atkin J., of murder, and was sentenced to death.

Llewelyn Williams, K.C. (with him *Trevor Hunter*) for the appellant, who was present. The appellant was a sergeant in the 6th Welsh Regiment, and on Christmas Day he was in charge of some men who were acting as sentries in the Swansea Docks; they carried loaded rifles. There was a considerable amount of drinking on the part of all the men during the day, and the appellant was very drunk by 8 p.m. About 10.30 p.m. he was told that a bottle of whiskey which his father had brought him was missing, and he suspected one of the privates, named Dudley, of having taken it; he therefore visited the post where Dudley was stationed and charged him with it. There was a dispute as to who struck the first blow, but a fight ensued, in which Gates, another private, came to Dudley's help, and together they got the appellant down, and, as he expressed it, "hammered" him. The appellant telephoned to the barracks that two men were drunk and disorderly at their posts, and Lieut. Brabazon came down and ordered the two men to be disarmed and taken under arrest to the drill hall.

1915
29 *March.*

WILLIAM HOPPER.

Reading L.C.J.
Brav J.
Lush J.

Gates was disarmed, and Dudley's rifle was taken away but not his bayonet. The two prisoners went off to the drill hall under an escort, of which the appellant was in charge. On the way appellant, in the hearing of Lieut. Brabazon, gave orders for the removal of Dudley's bayonet. Lieut. Brabazon then left the escort. One of the escort, Private Stephens, told Dudley to give up his bayonet; he refused, and according to the appellant when he repeated the order, Dudley, with his hand on the hilt of his bayonet, said to the appellant, "I will stick it into you." The men were halted, and the appellant gave the order to disarm Dudley. Dudley again threatened to stick his bayonet into the appellant. The appellant raised his rifle, and a shot from it killed Dudley and wounded Gates.

The substantial defence raised at the trial was that the rifle, which had a very light pull, went off by accident as the appellant was raising it to protect himself with the bayonet. This view was rejected by the jury, but I submit that there was ample evidence of provocation and threats which would have justified the jury in returning a verdict of manslaughter. It was a question for the jury whether Dudley's breaches of discipline in refusing to obey orders, and the threats uttered by him while under arrest and on the way to the drill hall were not sufficient to keep alive the passions of the appellant, and the provocation suffered by him at the hands of Dudley at the docks. There is a difficulty in running two inconsistent defences, but I did say to the jury that at the most the evidence only pointed to manslaughter. I took it for granted that the judge would direct the jury that it was open to them to return that verdict, but he told them that he could not understand how the case could be treated as one of manslaughter, and that in his view it was either accident or murder. In these circumstances the Court has power under s. 5 (2) of the Criminal Appeal Act to substitute a verdict of manslaughter for that returned by the jury. In *Welsh*, 11 Cox C. C. 336 (1869), Keating J. directed the jury that although he could see no evidence of such provocation as would reduce the crime to manslaughter, if they could discover it they could give effect to it.

The judge, further, gave no direction to the jury on the effect of drunkenness on the mind of a man charged with killing; a man who had recently been drunk would be more easily provoked,

1915
29 *March.*

WILLIAM HOPPER.

Reading L.C.J.
Bray J.
Lush J.

The evidence I wish to call will be material on the question of sentence if a verdict of manslaughter is substituted.

[The LORD CHIEF JUSTICE: We will hear it later if we decide in your favour.]

Ellis Griffith, K.C. (with him *Clive Lawrence*) for the Crown. The guiding principle is to be found in *Hampton*, 2 Cr. App. R. 274 (1909), where Lord Alverstone C. J. said: "It is suggested that the learned judge should have dealt more fully with the question of manslaughter in the summing up. Whether the direction upon that point was long or short, it was as favourable to the appellant as it could possibly be. We have to repeat that a summing up is not a dissertation upon the law, but must have reference to the way in which each case has been conducted at the trial." The defence never suggested at the trial what were the circumstances which would justify the jury in reducing the crime to that of manslaughter. There is no evidence that the appellant was under the influence of drink at the time. There may be evidence of provocation, and yet the man not be provoked; he is the person who can best speak to his state of mind at the time, and he said in evidence that he was not angry, and never meant to do the deceased any injury.

The Court referred to *Horn*, 76 J. P. 270; 28 T. L. R. 336; 7 Cr. App. R. 200 (1912), and *May*, [1912] 3 K. B. 572; 82 L. J. K. B. 1; 29 T. L. R. 24; 77 J. P. 31; 23 Cox C. C. 327; 8 Cr. App. R. 63, cases of indecent assault, where the defence of consent ought to have been put to the jury, although such a defence had not been raised, or had actually been repudiated by the prisoner.

Llewelyn Williams, K.C. The jury added a strong recommendation to mercy, which seems to shew they would have returned another verdict than murder had it been open to them.

Thomas Rees, called by leave of the Court, said: I am the licensee of a hotel in Swansea. On Christmas night, almost immediately after Dudley was shot, I saw the appellant, who said, "My

1915
29 *March*

WILLIAM HOPPER.

Reading L.C.J.
Bray J.
Lush J.

God, I've shot him, and he is one of the best pals I ever had." He was crying. A verdict of manslaughter was returned at the coroner's inquest, so I did not think that my evidence would be required at the trial.

The LORD CHIEF JUSTICE: The appellant, William Hopper, is a sergeant in the reserve battalion of the 6th Welsh Regiment. He was tried and convicted of the murder of Dudley, a private in the same regiment, who was under the appellant at the time. The verdict of the jury was accompanied by a strong recommendation to mercy. He now applies for leave to appeal against that verdict, and, following the practice of the Court, the application has been heard as if it were the appeal. Now the complaint made is that the judge in directing the jury told them that they must either find a verdict of murder or acquit the appellant; in other words that, if the jury did not accept the theory and evidence of the defence that the killing was accidental, they had no alternative but to return a verdict of murder The appeal has been very properly argued on the view that the true state of facts was, as found by the jury, that it was not an accident. The question left is whether it was open to the jury on the evidence, and whether the judge ought to have left to them the option, if satisfied that a verdict of manslaughter would be right, to return such a verdict.

It appears that on Christmas Day the appellant and ten or twelve men were stationed at Swansea Docks in order to visit ships. A considerable quantity of beer and spirits was consumed, and in the evening there is no doubt that a number of them were in a state of drunkenness. The appellant's father brought him a bottle of whiskey. The appellant was in such a condition that he had to sleep, and when he was aroused he missed the whiskey; in consequence of what some one told him he charged Dudley, the deceased, with having taken it. Then one struck the other, it is not certain which, and this resulted in a fight between the sergeant and Dudley and another man who helped him. The two got the appellant to the ground and, as he expressed it, "hammered" him. This resulted in a lieutenant being sent for, who ordered the men to be marched back under escort; the escort consisted of four men. During the struggle it is said by the appellant that Dudley threatened to stick a bayonet into him. The lieutenant ordered the two men complained of to be disarmed; one of them

1915
29 *March.*

WILLIAM HOPPER.

Reading L.C.J.

was, but not Dudley; before the lieutenant left, however, he heard the appellant give the order that he should be disarmed. Thereupon arose the incident of efforts to get the belt and bayonet from Dudley, Dudley saying, "What if I refuse?" He threatened to stick the appellant with his bayonet, and it is clear that he refused to give it up. The appellant was carrying a rifle of the old pattern with a very easy pull, the bayonet being fixed and the rifle loaded with live cartridge, which was quite proper in the circumstances. Then, having again given the order for Dudley to be disarmed, he gave the order "Halt! Left turn." The men thus faced the appellant, he being on the pavement about three inches higher than they. He tried to coax Dudley to give up his arms; Dudley refused and put his hand on his bayonet. Then in a moment, according to the view taken by the jury, the appellant levelled his rifle to his shoulder and fired, killing Dudley.

The defence raised at the trial, as shewn by the cross-examination of the witnesses, was that of accident. Before the judge came to sum up, counsel for the defence indicated quite clearly that though his defence was that the firing by the appellant was accidental, he was not giving up, but intended to claim a verdict of manslaughter if he did not succeed in getting one of acquittal. The judge took the view that on the facts as presented it was impossible for the jury to find manslaughter, and so he directed them either to acquit the appellant or to find him guilty of murder. After consideration of all the circumstances we have come to the conclusion that the question ought to have been left to the jury so as to enable them, if they thought right, and if they rejected the view that it was murder, to return a verdict of manslaughter. The reason we have come to this conclusion is not from any new view of the law, but because there was sufficient evidence of facts and circumstances to justify the jury, if they took a certain view of them, in finding manslaughter. It is not for us to say whether or not they would have done so. One must bear in mind the provocation caused by the fight and by the two men holding the appellant down and hammering him within so short an interval of time before the fatal shot. Further, and this is probably the most important fact, immediately before the firing the deceased said for the third time that he would stick the appellant, and this time the deceased placed his hand on his bayonet. Further, this was all grave insubordination on the part of a soldier

to his superior officer, done in the presence of other men, a circumstance which aggravated the matter. Moreover, it must be borne in mind, though it is very little to be relied on, that the fact that there had been so much drinking, and a fight, as well as other grave insubordination, all tended to make the appellant lose control of himself at a critical moment. In those circumstances we think the matter should have been left to the jury so that they might find murder or manslaughter as they thought right.

We wish to refer to the suggestion that, as the defence raised was that of accident, the judge was justified in directing the jury as he did. It is not the fact in this case that the appellant's counsel relied only upon that defence; he indicated in plain terms that if that failed he should hope for a verdict of manslaughter only. Even if he had never contended for a verdict of manslaughter, the Court does not take the view that the judge need not give the jury the opportunity of finding that verdict. The Court is of opinion that, whatever be the defence put forward by counsel, it is for the judge at the trial to put such questions to the jury as appear to him properly to arise on the evidence, even if counsel has not suggested such questions. Here the difficulty of raising alternative defences accounts for counsel having said little on the subject of manslaughter.

We wish further to say, in answer to another argument put forward for the Crown, and based upon the statement by the appellant that he was not angry when he did it, that we cannot agree that this statement necessarily negatives manslaughter. He was giving evidence and trying to shelter himself on the plea of accident; it was open to the jury to take the view that his statement that he was not angry was not true. In our opinion the words must not be taken literally to the exclusion of any other possible view of the facts and circumstances. The Court, with the assistance of the jury, must arrive, not at the view presented, but at a true view of the facts. We think, therefore, that the verdict cannot stand.

Having come to that conclusion, we have power under s. 5 (2) of the Criminal Appeal Act, to substitute the verdict which we think might have been found. We cannot say that it should have been found, but as the question was not put to the jury, the appellant must have the benefit of the lesser verdict of the two. We direct, therefore, that that verdict be entered and the verdict of

1915
29 *March.*

WILLIAM HOPPER.

Reading L.C.J.

murder be quashed. That being so, we have to determine what sentence to impose. We take into account the fact that he has borne a very good character up to the lamentable events of that day, but at the same time, while giving full effect to all the evidence of provocation, the fact remains that the appellant shot and killed, not by accident, a soldier under his command. Such a shooting cannot be justified. Loss of life resulted, and we cannot pass the matter over lightly. Taking all the circumstances into account, we pass a sentence of four years' penal servitude.

Verdict of manslaughter substituted.

Sentence varied.

Solicitors for the Appellant—*Andrew & Thompson*, Swansea.

A. L. B. T.

29 & 30 *March.*

ELLEN CLARA PEACOCK, HERBERT CHARLES PEACOCK, AND GRANTLEY ARTHUR PEACOCK.

In a proper case the Court will quash a conviction, though such a course will not, in effect, mitigate the sentence.

Appeal against sentence.

These were appeals against conviction by leave of the full Court. The appellant Ellen Clara Peacock was convicted, at the Bristol Assizes, on the 12th February, 1915, before Scrutton J., of obtaining credit under false pretences, and of disposing of property obtained on credit otherwise than in the ordinary way of her trade within four months next before the presentation of a bankruptcy petition against her, and was sentenced to six months' imprisonment in the second division on each charge, the sentences to run concurrently. The two male appellants were convicted at the same time of aiding and abetting her to commit these misdemeanours; on the first charge they were each sentenced to six months' imprisonment in the second division, and on the second

1915
29 & 30 *March.*

ELLEN CLARA PEACOCK, HERBERT CHARLES PEACOCK, AND GRANTLEY ARTHUR PEACOCK.

Reading
L.C.J.
Bray J.
Lush J.

charge Herbert Charles Peacock was sentenced to ten months' imprisonment in the second division, and Grantley Arthur Peacock to three months' imprisonment in the second division, the sentences to run concurrently.

F. E. Weatherly for the appellants, who were not present. The appellants are a mother and her two sons, and Mrs. Peacock was convicted as principal, and her sons for aiding and abetting her in the commission of offences under ss. 13 and 11 (13) of the Debtors Act, 1869, 32 & 33 Vict. c. 62. Mrs. Peacock was the proprietor of a business called the Champion Boot Co.; Grantley acted as works' manager and Herbert as traveller. The business was started by her in partnership with her husband and another son, Clifford, in 1898. In 1901 Mr. Peacock retired, and in 1908 Clifford left England, after making an arrangement with his mother that if he did not return by a certain date he was to be paid, as his share of the business, £1,000 within ten years.

Annual balance sheets were got out from 1903 onwards by one Freshwater, a well-known accountant in the boot trade, and the false pretences alleged with respect to the first charge were in connection with the balance sheet dated the 4th July, 1913; and there is no doubt that it was false by reason of the omission of certain figures, namely, (1) the £1,000 due to Clifford; (2) £1,350 due to Herbert for commission; and (3) £289 due to Clifford for goods sold to the Champion Boot Co. Except for the fact that Mrs. Peacock instructed Freshwater to get the balance sheets out there was, I submit, no evidence that she knew of, or was privy to, these omissions. The accountant's clerk attended at the office once a fortnight and she was entitled to rely on him; he was not called as a witness, but Freshwater, who only attended once a year, was. There was no evidence that Mrs. Peacock gave them any false information, or that she kept the books.

With regard to the second charge, there was no evidence that Mrs. Peacock knew that the goods had been bought, or that they had been disposed of. Herbert admitted in cross-examination that he had sold the goods and pocketed the proceeds, in fact, that he had robbed his mother. The judge ought to have stopped the case at the end of the case for the prosecution. If Mrs. Peacock's convictions are quashed, the convictions of her sons for aiding and abetting her must be quashed also.

1915
29 & 30 *March.*

ELLEN CLARA PEACOCK, HERBERT CHARLES PEACOCK, AND GRANTLEY ARTHUR PEACOCK.

Reading L.C.J.
Bray J.
Lush J.

Foote, K.C. (with him *Dummett*) for the Crown. As to the charge of disposing of goods otherwise than in the way of trade, the goods in question, leather, were only obtained after a lengthy correspondence with the vendor, who declined to supply them without payment, because he was owed so much by the firm already; at last the firm agreed to pay a bill they had given before it was due, and on these terms the goods were supplied. There was evidence that all the correspondence came before Mrs. Peacock. In her examination in bankruptcy she was asked why the goods were sold, and she answered, "Because we wanted the cash." The goods were sold not many days after their purchase at a much less price than that they had been bought at, and at a time when the firm was pressed for money. There was no evidence that she ever asked what had become of the goods. On this evidence there was a *primâ facie* case on which the jury were entitled to convict her.

[The LORD CHIEF JUSTICE: If the conviction stands on these counts are you satisfied?]

Yes; the sentences are concurrent.

Weatherly in reply.

BRAY J.: The appellants were charged under five counts with offences under the Debtors Act, 1869; three counts related to obtaining credit by false pretences, the false pretences being the publication of false balance sheets, and the two remaining counts to disposing otherwise than in the way of trade property obtained on credit and not paid for within four months next before the presentation of a bankruptcy petition against Mrs. Peacock. I propose to deal with the last two counts first. That the goods were obtained on credit and not paid for is clear. Goods to the value of £560 were obtained from Hepburn & Co., and to the value of £58 from Munt Bros. Those goods were delivered on the 20th December, 1913, and were disposed of in January, some few days afterwards, at a price considerably less than that agreed to be paid to the vendors. The money was not entered in the books and was not put into the business. In those circumstances it is impossible to say that there was not a strong case that they were disposed

1915
29 & 30 *March.*

ELLEN CLARA PEACOCK, HERBERT CHARLES PEACOCK AND GRANTLEY ARTHUR PEACOCK.

Bray J.

of otherwise than in the way of trade. The real question is whether Mrs. Peacock was privy to that act, and a party to such disposal. It is contended, and arguments well worthy of consideration are presented in support of the contention, that there was no evidence that she was privy to the disposal. Undoubtedly it is for the prosecution to prove that. They rely on the general position of Mrs. Peacock and on certain evidence.

She joined her husband and Clifford in 1898 in starting the business of manufacturing boots. It was not a large business; the turnover was from £20,000 to £25,000 in the course of the year. Mr. Peacock retired in 1901, and in 1908 Clifford left to go to America. She continued alone as the principal of the business, but there were co-operating with her her two sons, Herbert and Grantley; Herbert as a traveller, being away a considerable amount of the time travelling, and Grantley as manager of the works. What part did she take in the business? Welch said, and it was admitted by her, that she was there daily from eleven to three. Her own case was that she had the financial control of the business, and it was proved by more than one witness that she was a capable woman of business and a woman of strong character, not a mere nonentity. She signed all the cheques and bills. Now the question is whether that constituted a *primâ facie* case that she was privy to the transaction. The transaction was the purchase of leather to the value of £600, a large sum, and a purchase at a time when admittedly Mrs. Peacock was in a very critical position. Her liabilities were £10,000, her assets between £2,000 and £3,000. She was much in want of money, and therefore it was a matter as to which it was impossible for any person who had financial control of the business not to have cognisance. There was a considerable amount of correspondence at the time, a great deal of which dealt with the financial part of the transaction; Hepburn was pressing for payment in cash, and was eventually paid by bills. The evidence shewed that when she arrived first at the office, Mrs. Peacock opened the letters; when Grantley arrived first he opened them and laid them on her table for her to deal with. In those circumstances it is impossible to say that there was not a strong *primâ facie* case that she knew of the purchase.

But she must also have been privy to the re-sale. It seems to the Court that the presumption is that there would not have been a sale of those goods, bought, as the correspondence shews, to be

1915
29 & 30 *March.*

ELLEN CLARA PEACOCK, HERBERT CHARLES PEACOCK AND GRANTLEY ARTHUR PEACOCK.

Bray J.

used at once, without her being privy to it. The Court is of opinion that there is also a *primâ facie* case on that point. It was open to Mrs. Peacock to rebut it, and it may be that it did not require strong evidence to rebut it. The judge put that fairly and clearly to the jury. Her story was that she knew nothing about the matter, and never saw the correspondence. One does not wonder that the jury did not accept her story; therefore the matter was one proper for the consideration of the jury, and it is impossible to say that the trial was in any way unsatisfactory. There was one positive piece of evidence. In the bankruptcy proceedings Mrs. Peacock was asked why she sold the goods; she answered, "We wanted the money." They did want the money badly. The case was put properly to the jury by the judge, so the verdict on those two counts must stand.

As regards the other counts, we should be sorry to lay down that there was no evidence; at the same time the evidence was slight and the conclusion of the Court is that the verdict on those counts ought not to stand. The question is whether Mrs. Peacock knew that the balance sheet was false, and she may well not have known that the items in question ought to have been included. In the opinion of the Court, therefore, the verdict must stand on the fourth and fifth counts, and be quashed on the first, second, and third counts.

Convictions for obtaining credit by false pretences quashed.

Solicitor for the Appellants—*F. Spofforth*, Bristol.

A. L. B. T.

---

30 *March.*

JULIUS OPPENHEIMER AND THOMAS WILLIAM COLBECK.

Whether any given transaction is "supplying to" the enemy or "obtaining from" them "goods, wares or merchandise" within the Royal Proclamations under the Trading with the Enemy Act, 1914, 4 & 5 Geo. 5, c. 87, is a question of law for the judge.

Any commercial relations between a British subject and an enemy resulting in goods being forwarded to him from the enemy country are within the mischief of the statute.

These were appeals against conviction on points of law and applications for leave to appeal against sentence. The appellants were convicted, at the Central Criminal Court, on the 18th

1915
30 *March.*

JULIUS OPPENHEIMER AND THOMAS WILLIAM COLBECK.

Reading
L.C.J.
Bray J.
Lush J.

February, 1915, before Atkin J., of conspiracy to trade unlawfully with the enemy; Oppenheimer was also convicted of trading with the enemy, and Colbeck of aiding and abetting him in so doing. Oppenheimer was sentenced to two months' imprisonment in the second division and ordered to pay the costs of the prosecution; Colbeck was sentenced to one month's imprisonment in the second division.

Sir Edward Carson, K.C. (with him *Harold Morris*), for the appellants, who had been granted bail. The appellant Oppenheimer is of German birth; he has lived in this country since 1883, and became naturalised in 1889. Since 1899 he has traded for himself as a chromo-lithographer. In 1912, with the assistance of a German firm named Schneller & Co., of Nuremberg, he started a factory at Willesden. This business was carried on until April, 1914, on certain undefined relations with Schneller & Co. In that month arrangements were made by which the business became Oppenheimer's. The capital outlay had been £28,000, of which Schneller & Co. had provided £10,000. They owed Oppenheimer, however, £5,000 for moneys advanced, so this left Oppenheimer with a debt to Schneller & Co. of £5,000. Oppenheimer used to get designs in England for lithographic works, but as he had no staff at Willesden who could execute lithography on stone, these designs were sent to Schneller & Co.; that firm made the stones, and printed and sent the finished article to England. Then they sent over also transfers, or grease-proofs, which can be transferred on to stone without any process of lithography. Oppenheimer was entitled under the arrangement between them to a new transfer free for every 400,000 copies printed, and his case was that at the outbreak of the war he was entitled, without payment, to a great number of these transfers. Schneller & Co. also had on hand at that time an enormous quantity of orders for prints. Oppenheimer drew a distinction between these goods for which he would have to pay, and the transfers, and he proceeded early in August to take steps to get them sent to England, through Switzerland and Holland.

Colbeck was his clerk, and he was sent to Rotterdam to make arrangements with a representative of Schneller & Co. for having these transfers sent over. The prosecution was based on these facts which were not disputed by the defence, but I submitted that it did not necessarily follow that these circumstances amounted to

1915
30 *March.*

JULIUS OPPENHEIMER AND THOMAS WILLIAM COLBECK.

Reading L.C.J.
Bray J.
Lush J.

trading with the enemy, or that the transfers were "goods, wares or merchandise" within the meaning of the Trading with the Enemy Proclamation of the 5th August, 1914, and that the jury ought to be asked to say whether the goods had been obtained by way of trade. The judge held that the transfers were "goods, wares or merchandise," and that this question was entirely one of law; that the object of the Act was to stop intercourse between the two countries; that the prohibition was laid down in wide words without any exclusion of property which belonged to a subject of this country, or which had already been paid for; that licences to trade could be obtained in proper cases, and that it was not for a subject of this country to decide whether a particular transaction is for the benefit of an enemy or not; that the Proclamations and Act were not confined to commercial transactions, and that there was no evidence that this was not a commercial transaction. He held, further, that the only question for the jury was whether Oppenheimer did in fact trade with the enemy in the sense that he had obtained goods, wares or merchandise, as defined by the judge, from the enemy, and that it was not necessary to prove that the appellants meant to benefit the enemy. On this ruling I said I would not address the jury, and the appellants were convicted.

My appeal is on the ground that this ruling of the judge was wrong. The Trading with the Enemy Act, 1914, 4 & 5 Geo. 5, c. 87, is headed, "An Act to make provision with respect to penalties for Trading with the Enemy, and other purposes connected therewith." Under s. 1 (1), trading with the enemy is made a misdemeanour, and s. 1 (2) enacts, "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by his Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy."

"Provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy." It is, therefore, necessary to refer to the proclamations. That of the 5th August, 1914, is headed "A Proclamation relating to Trading with the Enemy," and the second paragraph states "And whereas it is contrary to law for any person resident, carrying on business, or being in Our Dominions, to trade or have any

commercial intercourse with any person resident, carrying on business, or being in the German Empire without our permission"; later it warns persons "Not to supply to or obtain from the said Empire any goods, wares or merchandise, or to supply to or obtain the same from any person resident, carrying on business, or being therein, nor to supply to or obtain from any person any goods, wares or merchandise for or by way of transmission to or from the said Empire, or to or from any person resident, carrying on business, or being therein, nor to trade in or carry any goods, wares or merchandise destined for or coming from the said Empire, or for or from any person resident, carrying on business, or being therein." These words must be taken with reference to the recital. Obtaining must mean by purchase or transfer. The object of the proclamation, taken as a whole, is to prevent the enemy from being benefited. An explanation of the proclamation was issued with it which stated "What is prohibited is trade with any firm established in hostile territory." A further proclamation was issued on the 9th September, 1914, but it does not affect the position; though much more elaborate it is limited to the course of trade. It does warn persons "Not to pay any sum of money to or for the benefit of an enemy," 5 (1), but these words again must be read in connection with the recital. I do not say that the jury could not have convicted the appellants, but they have never been asked to decide the real issue in the case.

The sentences were excessive. The matter was one of great difficulty, both on the law and the facts, which arose within two days of war breaking out. No benefit has been done to the enemy, while, on the other hand, employment has been given in this country. On the 1st September Oppenheimer gave the Government full information about the transaction. Two points were relied on to his detriment. When Colbeck applied for a passport, the letter asking for it stated that he wished to go to Rotterdam with reference to goods belonging to his English firm, the Chromo Co., suppressing the name of Oppenheimer. Colbeck got no advantage by going abroad. The second point was that some of the transfers obtained through Holland were ordered to be stamped "Made in Holland." The explanation given was that they were very sensitive and easily spoilt by handling, and that it was thought that this would cause the Customs officials to handle them less.

1915
30 *March.*

JULIUS OPPENHEIMER AND THOMAS WILLIAM COLBECK.

Reading L.C.J.
Bray J.
Lush J.

R. D. Muir (with him *Cecil Whiteley*) for the Crown, was called upon as to the sentences only. The whole correspondence shews that the appellants were most anxious that the transaction should be kept secret. It also shewed that there had been an agreement by which money was to be transferred through Holland to Schneller & Co. When Oppenheimer applied for a licence he never hinted that he had been getting in these transfers all the time.

The LORD CHIEF JUSTICE: The appellants were convicted on an indictment which charged them and others with conspiring unlawfully to trade with the enemy. Oppenheimer was convicted of trading with the enemy on six specified dates, and Colbeck of aiding and abetting him on two of the dates. Oppenheimer was sentenced to two months' imprisonment in the second division and ordered to pay the costs of the prosecution, and Colbeck to one month's imprisonment in the second division. They appeal both against their convictions, on grounds of law, and against the sentences.

The facts are not in dispute. Oppenheimer, who was a German-born subject, was naturalised in 1889, and started business as a lithographer in 1890 in Newgate Street. His business connection was extensive, and with the co-operation of Schneller & Co., of Nuremberg, he began building a factory in March, 1912, and traded as a printer under the name of the Chromo Co. He spent a large amount of money, £18,000 in all, and Schneller about £10,000. In April, 1914, Schneller owed Oppenheimer £5,000 on a business account. That was set off against part of the debt and left Schneller with a debt of £5,000, on which Oppenheimer agreed to pay 4½ per cent. interest. Business relations of an extensive character continued, especially with regard to the supply by Schneller of lithographic designs and transfers, on terms which it is not necessary to discuss, under a business arrangement with Oppenheimer. That was the state of affairs on the 4th August, 1914, when war was declared between England and Germany. Between that date and the 5th October Oppenheimer did get some of the transfers to which he was entitled. The question is whether in obtaining the goods he was in contravention of the Trading with the Enemy Proclamations of the 5th August and the 9th September, both duly legalised by the Trading with the Enemy Act, 1914. The words on which the case turns are,

"whereas it is contrary to law for any person resident, carrying on business, or being in Our Dominions to trade or have any commercial intercourse with any person resident, carrying on business, or being in the German Empire without Our permission: . . . .

"Now, therefore, We have thought fit, by and with the advice of Our Privy Council, to issue this Our Royal Proclamation, and We do hereby warn all persons resident, carrying on business, or being in Our Dominions:"

Then come the operative words, "Not to supply to or obtain from the said Empire any goods, wares or merchandise."

Substantially the same words are used in the Proclamation of the 9th September.

It is argued that a man cannot be said to obtain goods, wares and merchandise as a matter of law if he obtains goods, wares and merchandise without making any payment for them. Sir Edward Carson does not say that the jury might not have found that he obtained them, but that before there was a conviction the jury must mean that he obtained them by way of trade; and it is contended that the matter ought to have been put to the jury with a direction that they were to say whether he obtained them by way of trade or not. That is really the point of law on which everything turns in this case. In reliance on the recital Sir Edward Carson argues that the words of the operative part of the Proclamation must be read only in relation to trading, and that whether or not he obtained the goods in relation to trading was not a matter of law, but one which the judge ought to have left to the jury.

When we look at the words of the Proclamation it seems to us that the matter is quite clear. We are only entitled to look at the recital if we think that there is any ambiguity in the words of the operative part. We do not desire to say that it is impossible to conceive a case where it might be proper to leave to the jury some such question as has been suggested. In this case, when one bears in mind the relation between the parties, it seems to us that the judge was quite right as a matter of law. The judge ruled as a matter of law that the transfers were "goods, wares or merchandise." We think he was right in so holding. He further held that obtaining them in the circumstances before him amounted in law to obtaining goods within the Proclamation. It may be that the language used by him was possibly a little wide, but we are

1915
30 *March.*

JULIUS OPPENHEIMER AND THOMAS WILLIAM COLBECK.

Reading L.C.J.

satisfied that where goods are supplied from an enemy country to a British subject under a commercial contract, and where commercial relations exist between an enemy and a British subject, resulting in goods being forwarded to him from the enemy country, that amounts to obtaining goods, wares, or merchandise from an enemy subject. The word "obtain" is correlative to the word "supply," and, indeed, it is as if the words "supply to" were changed to "supply from." It seems to us plain that the case was within the Proclamation, and that it was in law obtaining goods, wares or merchandise within the Proclamation. Therefore, the convictions must stand.

On the question of sentence our attention has been called to the special facts which weighed with Atkin J., and we have also had the advantage of hearing Sir Edward Carson's plea on behalf of the appellants. The judge had the appellants before him and heard them give their evidence. He came to the conclusion on the whole that he was satisfied that the appellants broke the Act knowing that they were doing wrong. Although it is no defence to say that they broke it not knowing that they were doing wrong, this consideration would weigh on the question of sentence. When, however, the judge has come to a conclusion, and we have heard the evidence on which he arrived at that conclusion, it follows that it is impossible, if we follow, as we must, the principles guiding this Court, that we should interfere with the sentences. The time already served may count.

Appeals dismissed.

Solicitors for the Appellants—*Kenneth Brown, Baker Baker & Co.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, MR. JUSTICE LUSH, MR. JUSTICE BAILHACHE, AND MR. JUSTICE SHEARMAN.

FREDERICK ERNEST GRUBB.

1915
19 *April.*

The true test whether a defendant has been "entrusted with" or has "received" property "for or on account of any other person" within s. 1 (1) *of* 1 *Edw.* 7, c. 10, *the Larceny Act*, 1901, *is whether, in fact, he has had control of the property; the interposition of the machinery of a limited company will not protect one who is nominally its agent, but in reality its managing director.*

Proviso to s. 4 (1) *of the Criminal Appeal Act applied.*

Appeal against conviction on points of law.

The appellant was convicted, before the Recorder, at the Central Criminal Court, on February 17th, 1915, of fraudulent conversion of money and shares, and was sentenced to nine months' imprisonment in the second division.

After a hearing on March 22nd, before the Lord Chief Justice, Lush and Low JJ., it was ordered that the case be re-argued before a fuller Court. Appellant was released on bail.

Hawke, K.C., and *Horace Douglas*, for the appellant. The appellant was indicted under s. 1 (1) of the Larceny Act, 1901, with fraudulently converting to his own use and benefit certain money and shares with which, as the Crown alleged, he had been entrusted or which he had received from various persons in order that he might apply it for or in the purchase of stocks and shares and the proceeds of the sale of the shares in purchasing other shares. The moneys were not applied in the purchase of the stocks or shares, but were paid into the banking account of the company and used by the company in its business, and the prosecutors never got their stock or shares. The appellant was a member of a company called H. St. John Oliver & Partners (Ltd.), which carried on business as outside brokers. He held two out of the six shares in the company which had been issued. When the

1915
19 *April.*

FREDERICK ERNEST GRUBB.

Reading L.C.J.
Avory J.
Lush J.
Bailhache J.
Shearman J.

company was formed he was a director, but before the transactions in question he had resigned his position on the board. The evidence on the exact character of his work on behalf of the company after his resignation was greatly in conflict, the prosecution alleging that he continued to go to the office day by day to see the books and correspondence and to conduct the business exactly as he had done during the time that he was a director. This the appellant denied.

There is no evidence that the appellant has committed any offence either under sub-s. (1) of s. 1 of the Larceny Act, 1901, or at all. That sub-section provides that "Whosoever (a) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody, or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or (b) having, either solely or jointly with any other person, received any property for and on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanour." He has not committed any offence under paragraph (b). The money was received by the company from the persons who sent it to the company. Nor was he entrusted with any of these sums of money within the meaning of paragraph (a). The persons who sent the money to the company did not at any time say that they entrusted the moneys to the appellant. The money was entrusted to the company, which was a different entity. Each of the persons who had sent moneys to the company proved for the respective amounts in the liquidation of the company, and one of such persons before the liquidation had obtained judgment against the company and had garnisheed the balance standing to the credit of the company at its bank. On this point they referred to *Salomon* v. *Salomon*, [1897] A. C. 22; 66 L. J. Ch. 35; 75 L. T. 426; *Booth* v. *Helliwell*, [1914] 3 K. B. 252; 83 L. J. K. B. 1548; 111 L. T. 542; 78 J. P. 223; and *Continental Tyre Co.* v. *Tilling*, [1915] 1 K. B. 893; 31 T. L. R. 159.

The prosecution meet this argument by alleging that the company was a bogus company, a mere dummy, which was controlled by the prisoner, and which in fact was only a fabrication behind which he could shelter himself if necessary. They argue from

1915
19 *April.*

FREDERICK ERNEST GRUBB.

Reading L.C.J.
Avory J.
Lush J.
Bailhache J.
Shearman J.

that that receipt by the company was receipt by the appellant, and "entrusting" to the company "entrusting" to the appellant. That, however, is quite inconsistent with the facts as proved at the trial, and in any case it is impossible in view of the authorities to suggest that the company was not a legal entity distinct from and independent of the appellant.

[Avory J. referred to *Fullagar*, 14 Cox C. C. 370; 44 J. P. 57; C. C. R.]

The learned judge failed to direct the jury aright. He misdirected the jury by telling them that they could find that the appellant was the company, and that if the company converted the moneys the appellant was solely responsible.

The Solicitor-General (*Sir S. O. Buckmaster, K.C.*), *Bodkin*, *Branson*, *Cecil Whiteley*, and *Montague Shearman*, for the Crown. The question in this case is who is responsible for these persons being deprived of their money. It is clear that the appellant is responsible. The case of *Salomon* v. *Salomon* merely decides that by law a duly registered company is in itself distinct from the man who created it and the shareholders. For the rest, it merely decided that in the special circumstances of that case the contract for the sale of property could not be set aside. This has no application to the question whether a man may commit a crime through the instrumentality of a company. Here the jury found that the appellant did so commit the offence. They found in effect that defendant was responsible for all the acts that the company had done; these, if committed by an individual, would clearly have been criminal. By directing and controlling the acts of the company the appellant becomes as responsible as if he had done the acts himself. Further, it is too narrow a construction to place upon sub-s. (1) (b) of s. 1 of the statute to hold that the property must be received for and on account of a third person, and not for and on account of the sender. The suggested distinction between the two parts of the sub-section could not hold, as (a) clearly applied to money entrusted by A. to B. for the benefit of C. as well as to money entrusted by A. to B. for the benefit of himself; and the same is true of (b). The distinction between the two parts is really due to the fact that people in the position of estate agents

1915
19 *April.*

FREDERICK ERNEST GRUBB.

Reading
L.C.J.
Avory J.
Lush J.
Bailhache J.
Shearman J.

had always been able to escape criminal liability if they failed to pay over the rents they collected simply because the receipt did not make them trustees.

They referred to *Lord* (1905), 69 J. P. 467.

Hawke, *K.C.*, in reply, referred to *South*, 71 J. P. 191 (1907).

Cur. adv. vult.

G. F. L. B.

10 *May.*

The following written judgment was delivered by the LORD CHIEF JUSTICE: The appellant was convicted under the Larceny Act, 1901 (1 Edw. 7, c. 10), of having fraudulently converted to his own use or benefit property entrusted to him for certain specific purposes and property received by him for or on account of another. He appeals to this Court to quash the conviction on two grounds:—The first, that as a matter of law there was no evidence to support the verdict. The second, that the learned Recorder had misdirected the jury. If there had been no company in existence there is no doubt that if there was evidence that the property had been entrusted to or received by the appellant there would have been ample evidence to support the conviction. But it is strenuously contended that the property was in fact and in law entrusted to or received by the company, and not to or by the appellant. It is not in dispute that the moneys were fraudulently converted, but the appellant says they were fraudulently converted by the company and not by him. The company, it is said, was duly formed and incorporated under the Companies Act, and, therefore, was a legal entity—a person. See *Salomon* v. *Salomon*, [1897] A. C. p. 22. It is contended that the owner of the property intended in each case to entrust it to the company and not to the appellant, and that the property was in fact received by the company and not by the appellant; that as the property came into the possession of the company and the moneys were paid into the banking account of the company and were entered in the books of the company and were applied to the use and for the benefit of the company, the appellant could not be convicted of any offence under the statute. The question raised is of general importance, for if

the appellant's contention is right it would follow that by the interposition of a duly formed company as the person entrusted with the property or by whom it is received, no person could be convicted of offences under the Larceny Act, 1901, and indeed of any offence against the criminal law, notwithstanding the undoubted fraudulent conversion of the property, since the company cannot be indicted and sent to prison. Section 1 of the Larceny Act, 1901, was passed for the purpose of meeting technical difficulties which had arisen in proving offences under ss. 75 and 76 of the Larceny Act, 1861, and was substituted for these sections. The first point to be decided in this case is whether there was evidence that the appellant was "entrusted" with the property in question or whether he received it for or on account of any other person. This Court has no doubt that if the appellant was entrusted with the property or if he received it there was evidence that he fraudulently converted it to his own use or benefit. In the opinion of this Court a person may be entrusted with property or may receive it for or on account of another person within the meaning of this section, notwithstanding that the property is not delivered to him directly by the owner and that in fact the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person in circumstances whereby he *becomes* entrusted or whereby his receipt *becomes* a receipt for or on account of another person and fraudulently converts it or the proceeds, then he has committed an offence within the section. For the purpose of determining whether the offence has been committed, the words "being entrusted" should not be read as being limited to the moment of the sending or delivering of the property by the owner, but may cover any subsequent period during which a person becomes entrusted with the property. Equally, the words "having received" may cover the receipt at any time by a person who receives the property for or on account of another. There cannot, however, be a fraudulent conversion without an intent to defraud. A company has no mind and cannot have an intention; if the person directing and controlling the affairs of the company and by whose instructions the property has passed into the possession of the company and has been converted intended to convert it fraudulently he would be guilty of an offence whether the property was fraudulently converted to the use and

1915
10 *May.*

FREDERICK ERNEST GRUBB.

Reading L.C.J.

benefit of the company or to his own use and benefit. If he did the acts with an intent to defraud it would not be an answer to prove that he did them as the agent or servant of another person, whether a company or an individual. Moreover, if the company was used by his directions as the instrument so as to enable him in the name of the company to become possessed of the property, and by means of the company to convert it fraudulently to his own use and benefit, he would be guilty of an offence under this statute.

Having now stated the law applicable, we proceed to examine the evidence. Where there is a conflict of testimony it must be considered by the light of the verdict.

The charges made against the appellant and of which he was convicted were in respect of—

(a) A sum of £894 2*s*. sent by a Miss Miller for the purchase of £1,200 consols;

(b) Certain shares sent by one Ranking for sale with instructions to invest the proceeds in other shares;

(c) A sum of £311 6*s*. sent by Ranking to purchase shares; and

(d) A sum of £91 5*s*. 6*d*. sent by one Barthrop for the purchase of £100 stock.

Oliver & Partners, Limited, was a company formed under the Companies Acts to carry on the business of stock and share brokers. In 1912 it went into liquidation and the goodwill of the business was purchased by the appellant, who formed a new company in August, 1912, with the name of H. St. John Oliver & Partners, Limited. This company took over the assets of the old company and carried on the business of stock and share brokers at 68, St. James' Street, Pall Mall, and paid or agreed to pay £400 per annum for its offices. The appellant and one Oliver were the directors, Jones was the managing clerk, and other persons were also employed. According to the evidence of Jones and of Oliver the persons employed were engaged by the appellant. No business was conducted except under his instructions; Oliver superintended the routine of the business and sought customers, but no business of any importance was ever transacted except under the directions of the appellant. The letters were placed before him and were answered or dealt with in pursuance of orders given by him. The appellant was in daily attendance at the office of the company, and the books of the company were also kept and the entries made under his directions. The pass book of the company's banking

account and the accounts of clients with the company were placed before him. Instructions for the purchase or sale of stocks or shares, payments by the company and the dealing with moneys paid to the company took place under the sole direction and exclusive control of the appellant, who supplied money to the company and financed it. In the words of the managing clerk, "no one else had any control over the business of the firm." In November, 1912, the appellant resigned his position as director of the company because of some law suit in which he was concerned, and one Forde took his place. Forde was a friend of the appellant and had been some little time in the office of the company to learn the business. From April 7th, 1913, to May 7th, 1913, there were no directors of the company. No change whatsoever was ever made in the conduct of the business, it continued as before under the exclusive control and direction of the appellant. The company was wound up in June, 1913, and at that date it appears from the company's books that the company was indebted to the appellant in the sum of £1,245. The company never had sufficient business to make it a paying concern. The moneys paid into its banking account were derived from customers who sent either money to invest or shares to sell or from the appellant. On the 14th December, 1912, a Miss Miller forwarded the sum of £894 2*s*. addressed to Oliver Partners, Ltd., the old company, with instructions to purchase consols to the nominal value of £1,200. The letter was answered on the 16th December in the name of the new company, H St. John Oliver & Partners, Ltd., enclosing a contract note shewing the purchase by the company on her behalf of £1,200 consols for the January consols account. The contract note was a mere sham, no transaction had been executed in consols. A book entry was made of a purchase of £1,200 consols for Miss Miller from the T.G.W. Syndicate, Limited. The T.G.W. Syndicate, Ltd., was another company whose business was conducted at the same address by the appellant. Another entry recorded that the appellant had purchased £1,200 consols for the T.G.W. Syndicate. These entries were mere fictitious records of transactions which had never taken place. They were made by the instructions of the appellant. The sum of £894 2*s*. was paid into the company's banking account. At that date the account was overdrawn to the extent of some £400 against securities which had been deposited. The effect of the payment of Miss Miller's money was

1915
10 May.

FREDERICK ERNEST GRUBB.

Reading L.C.J.

to put the company's account in credit and to release the securities held by the bank. Subsequently, Miss Miller having complained of the non-receipt of the consols or interest on the same, a dividend of £7 1*s*. 3*d*., purporting to be the amount received on the consols, was sent to Miss Miller. No such sum had been received, it was debited to the account of the appellant with the company. It was not in dispute that no consols had ever been purchased for Miss Miller and that the money sent by her had been fraudulently converted. There is abundant evidence that the material acts relative to Miss Miller's money were done by the directions of the appellant. The letters and documents were placed before him, and on various occasions both Oliver and Jones respectively mentioned to the appellant the omission to purchase the consols on Miss Miller's account. The appellant denied all knowledge of the facts relating to Miss Miller until March, 1913, but it is evident from the verdict of the jury that they preferred the evidence of Oliver and Jones and rejected the appellant's.

In December, 1912, one Ranking forwarded the certificate and transfer of certain shares to the company with instructions to sell them and purchase other shares. Subsequently, Ranking forwarded £311 6*s*. to the company with instructions to purchase shares for the amount. The appellant was aware of all the material facts and gave the directions relating to the dealing with the shares and the money. Fictitious records of transactions which had never taken place were made in the books of the company and sham contract notes were sent in the name of the company and, according to the evidence of Jones, by the directions of the appellant. Ranking never in fact received either shares or money, and both the shares and the money sent by him were fraudulently converted. Similar transactions and with similar results took place with one Barthrop who forwarded money to the company with instructions to purchase £100 Japanese stock. The Court is of opinion that there was ample evidence to support the conviction of the appellant in respect of all these charges. Whether the transactions are regarded as those of the company directed and controlled by the appellant as the agent of the company, or whether they are regarded as the transactions of the appellant using the company as the instrument to carry them out, there is abundant evidence that, although the property was sent to the company, the appellant obtained or assumed exclusive control

1915
10 *May.*
FREDERICK ERNEST GRUBB.
Reading L.C.J.

over the property in question and that it was fraudulently converted by his directions. There was, therefore, evidence to support the conviction, and the appellant's first point fails.

Upon the argument as to misdirection of the jury by the learned Recorder, it is true that there are passages in the summing up which apparently fail to recognise the existence of the legal entity of the company as a separate person, and which taken alone might convey the idea that a one-man company was necessarily a sham or bogus company, but viewed as a whole and without too minute an examination of the language of the Recorder we are of opinion that it sufficiently directs the attention of the jury to the material questions of fact; namely, whether the appellant was the person who, having complete control of the affairs of the company, had become entrusted with or had received the property although nominally it was delivered to the company or paid into the banking account of the company, and whether the appellant had fraudulently converted the property either to the company's or to his own use and benefit. In our opinion the passages in the summing up of which complaint is made have not caused any substantial miscarriage of justice. If these observations had not been made by the Recorder and if the direction had been quite accurate in law the result on the facts of this case would have been the same, and the appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors for the Appellant—*Good, Good & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE LUSH.

1915
19 *April.*

WALTER STALLWOOD.

Severity of sentence.

Appeal against sentence.

The appellant was convicted, before Judge Rentoul, at the Central Criminal Court, on February 19th, 1915, of permitting premises to be used as a brothel, and was sentenced to nine months' imprisonment in the second division.

Huntly Jenkins, for the appellant (under s. 10 of the Criminal Appeal Act), who was on bail. The sentence is excessive. The appellant was, it is true, convicted for the same offence in 1913 and was fined £3. Under the provisions of the Criminal Law Amendment Act, 1885, however, four months is the maximum sentence for a second offence. The appellant was convicted of keeping a brothel at common law (a count for which was added at the trial), but that is now superseded by the statute. Moreover, there was no evidence that this was a serious offence.

Montague Shearman, for the Crown. I do not think I can justify this sentence of nine months' imprisonment. I agree that there was no evidence that these premises were being used as a brothel on an extensive scale.

The LORD CHIEF JUSTICE: In October, 1913, this appellant was convicted of permitting premises to be used as a brothel and was fined the sum of £3. Early in this year he was again charged with the same offence. He elected to go for trial instead of being dealt

1915
9 April.

WALTER STALLWOOD.

Reading L.C.J.

with summarily, and the result was that he was convicted and sentenced to nine months' imprisonment in the second division. He does not appeal against the conviction, but his counsel has offered us arguments in mitigation of the sentence. The conclusion to which we have come is that in the circumstances of the case it is sufficient for this man to serve a term of five weeks' imprisonment in the second division, running from the date of his conviction (February 19th). The result is that he will now be discharged.

Sentence reduced.

G. F. L. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE AND MR. JUSTICE AVORY.

1915
26 *April.*

JOHAN METZ.

The Court will not give effect to a purely technical point which might have been taken at the trial.

This was an appeal against conviction on points of law. Appellant was convicted, at the Central Criminal Court, on the 17th March, 1915, before Darling J., of trading with the enemy, and was sentenced to six months' imprisonment.

George Elliott, K.C. (with him *Roome*), for the appellant, who was not present. Under s. 1 (4) of the Trading with the Enemy Act, 1914, 4 & 5 Geo. 5, c. 87, a prosecution under s. 1 of the Act is not to be instituted except by or with the consent of the Attorney-General. No evidence was given at the trial that such consent had been obtained, and therefore I submit there was no foundation for the jurisdiction of the Court before which the appellant was convicted, and in such a case the proviso to s. 4 (1) of the Criminal Appeal Act does not apply. *Bates*, 6 Cr. App. R. 153 (1911). The Attorney-General's *fiat* should be produced, though his handwriting need not be proved unless it is challenged. *Fuidge*, L. & C. C. C. 390; 33 L. J. M. C. 74 (1864). I admit that the point was not taken at the trial, but the defence is entitled to remain silent and leave it to the prosecution to prove whatever is necessary. I am informed, and quite accept, that the consent of the Attorney-General was in fact obtained.

[AVORY J.: In *Waller*, [1910] 1 K. B. 364; 79 L. J. K. B. 184; 74 J. P. 81; 102 L. T. 400; 26 T. L. R. 142; 3 Cr. App. R. 213, the Court decided the same point with regard to the consent

1915
26 *April.*

JOHAN METZ.

Reading L.C.J.
Lord Coleridge J.
Avory J.

of the Director of Public Prosecutions required by s. 10 of the Prevention of Crime Act, 1908, 8 Edw. 7, c. 59.]

Counsel then proceeded to argue that there was no evidence that the appellant knew that the goods, which formed the subject of the prosecution, were of German origin. This part of the appeal is not material for the purposes of this report.

Travers Humphreys, for the Crown. The *fiat* of the Attorney-General was produced at the police court, so it came to the Court attached to the depositions.

The LORD CHIEF JUSTICE: The appellant was convicted of conspiring with other persons to trade with the enemy, and with trading, and with attempting to trade, with the enemy, being offences under the Trading with the Enemy Act, 1914. He appeals on law against his conviction. Mr. Elliott has taken two points on his behalf, and the first is that it is necessary that the consent of the Attorney-General should be given before a prosecution is instituted; under s. 1 (4) of the Trading with the Enemy Act. It is not suggested that the prosecution was in fact instituted without the necessary consent, but it is said that there was no evidence of it at the trial. The point was not taken at the trial. As we now know, the consent was in fact proved at the police court. The document was in Court at the trial, but it was not formally proved. If the point had been taken at the trial the defect would have been immediately cured, so the point is a pure technicality. We do not think it possible for the point now to succeed in this Court when there was an opportunity for counsel to take it in the Court below if he desired.

Moreover, in *Waller* a similar point arose with regard to the consent of the Director of Public Prosecutions, which is made necessary by the Prevention of Crime Act, 1908, before proceedings can be taken in respect of habitual criminals. It was there said by the Court that in the absence of an objection on behalf of the offender the consent must be presumed. Lord Alverstone C.J. dealt in that case with the procedure under the Vexatious Indictments Act, and said, " It is the duty of the clerk of assize to satisfy himself before the bill is presented to the grand jury that all the necessary steps preliminary to indictment have been taken, and,

1915
26 *April.*

JOHAN METZ.

Reading
L.C.J.

unless objection be taken by the prisoner that there was no consent in fact, it is to be presumed that the clerk of assize has discharged his duty in that respect." Exactly the same principle must apply here. Our attention has been called to the case of *Bates*, where the objection was taken that consent had not in fact been obtained, which is a totally different matter; it was there pointed out by Lord Alverstone that although the point had not been taken below it was necessary that there should be consent before the prosecution was instituted. No consent had been obtained, so the conviction was quashed. The case was decided on principles which do not conflict or clash with the view of the Court in the present case. The Court gives no effect to a technicality, but it does give effect to a matter of substance.

His Lordship then gave the reasons of the Court for deciding that the appeal failed also on the second ground put forward.

Appeal dismissed.

Solicitors for the Appellant—*Williamson, Hill & Co.*

A. L. B. T.

HYMAN KURASH.

When a defendant has been asked an inadmissible question which the judge has disallowed, the Court will consider in each case whether the prejudice created against the defendant by such question has been sufficiently dispelled by the judge.

Severity of sentence mitigated in view of previous good character.

This was an appeal against conviction on points of law and an application for leave to appeal against sentence. Appellant was convicted, at the Central Criminal Court, on the 23rd March, 1915, before the Recorder, of conspiracy to defraud and conspiracy to steal, and was sentenced on the 29th March to twenty months' imprisonment with hard labour and twenty months' imprisonment, the sentences to run concurrently.

Newbolt, K.C. (with him *Anthony Young*), for the appellant,

1915
26 *April.*

HYMAN KURASH

Reading
L.C.J.
Lord
Coleridge J.
Avory J.

who was present. The appellant was tried with four other men, all of whom were convicted, for taking part in a conspiracy known as a mock auction. The charge against him was that he had made a bid of ten shillings and received a watch and the ten shillings back, the auctioneer saying that he did this to advertise the auction, and that the appellant afterwards returned the watch to stock. He admitted that he had been at the place at 12 midday, and that he knew the four other prisoners, but he said he was not there between 12.45 and 3 p.m., between which hours the acts in question were said to have taken place. He stated that he had gone to a registry office in order to marry Madame Dyas, who, he alleged, was the proprietress of the business. Mr. Muir, who appeared for the prosecution, asked him in cross-examination, whether he was not living with her. The appellant asked if he must answer the question, and the Recorder said that he must He then admitted it. Later, Mr. Muir asked whose marriage he had gone to register at the registry office, and appellant answered, his own with Madame Dyas. Q. "Has she not got a husband alive?" A. "She is not a married woman." The Recorder ruled against another question of this sort on the ground that the appellant, if he answered it, might incriminate himself. By s. 1 (f) of the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, the appellant should not have been required to answer either of these questions; but, further, they should not even have been asked. The questions tended to shew that he was of bad character, and so far as I can find there is no reported case that turns on that part of the section. The questions were not admissible evidence to shew that he was guilty of the offence with which he was charged, or to negative the *alibi* set up by him. See *Fisher*, [1910] 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176, and *Ellis*, [1910] 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 22 Cox C. C. 330; 26 T. L. R. 535; 5 Cr. App. R. 41.

The Recorder in his summing-up did tell the jury that they must not let the second question prejudice them, and that there was nothing to shew whether the appellant knew that Madame Dyas' husband was alive or not.

[AVORY J.: *Chitson*, [1909] 2 K. B. 945; 79 L. J. K. B.10;

1915
26 *April.*

HYMAN KURASH.

Reading L.C.J. Lord Coleridge J. Avory J

73 J. P. 491; 53 S. J. 746; 25 T. L. R. 818; 2 Cr. App. R. 325, deals with a suggestion that the prisoner was of bad character.]

But there the statement by the prisoner, if made, was admissible to shew that he was guilty of the offence with which he was charged.

The sentence was excessive; the appellant has not been convicted before. Two of the men who were charged with him who had several previous convictions were only given a sentence of eighteen months. Apparently the Recorder was influenced by the fact that Canadians had been defrauded at other places of a similar character, and that the appellant had not enlisted. He also said that he was the worst offender because he was running the whole thing with Madame Dyas; the only evidence to support this was that the appellant on arrest said, "Don't charge old Bloater" (meaning one of the other prisoners), "I have only employed him two or three days," but he denied using these words.

Roland Oliver (with him *R. D. Muir*), for the Crown. Both questions were properly admissible as tending to prove that the appellant had committed the crime with which he was charged. The cases on the section are only illustrations and are not exhaustive. The case suggested for the defence was that he was a mere employé; it was therefore material to shew that he was living with the woman who he himself alleged to be the proprietress of the business. As to the second question, Mr. Muir tells me that when he asked the appellant whom he had gone to marry he had no idea what the answer was going to be. The question disallowed by the Recorder was only directed to challenging the truth of his statement. In any case the direction of the Recorder cured the mischief if the question was asked improperly.

Newbolt, K.C., in reply, referred to *Rodley*, [1913] 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 465; 58 S. J. 51; 29 T. L. R. 700; 9 Cr. App. R. 69.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment which charged him with four others, who were also convicted, and have not appealed, with conspiracy to defraud and conspiracy to steal. He was sentenced to twenty months'

1915
26 *April.*

HYMAN KURASH.

Reading L.C.J.

imprisonment with hard labour on the first charge, and twenty months' imprisonment on the second, the sentences to run concurrently. He appeals against his conviction, and also asks for leave to appeal against his sentence. He, in conjunction with the four other prisoners, was concerned in the business of the City Auction Rooms, High Street, Whitechapel, at which a mock auction was carried on. The facts are not in dispute, and it is not suggested that, if he was present there at the material times, he was not rightly convicted. The evidence against the appellant was that of three police officers, who stated definitely that he was there for part of the time at least, and that he took some part in the frauds. This was denied by the appellant.

It is said that the conviction must be quashed because questions were put which tended to shew that the appellant was a person of bad character within the Criminal Evidence Act, 1898, and that therefore, the questions having been put, and repeated in a different form by counsel for the prosecution, the provisions of the statute were infringed. I will deal first with the complaint that is second in order of time in order to clear it out of the way. It was said that the appellant on the 4th March, the day on which the offences were committed, was absent during part of the afternoon, covering the period of the offences, and had gone to a registry office to get married to Madame Dyas, who, according to the evidence, was a married woman living apart from her husband. A question was put by counsel for the prosecution asking whether Madame Dyas was not married, and then he asked, "Is she not living apart from her husband?" The Recorder said, "Do not answer that yet," and pointed out that it might suggest that he had been a party to bigamy. Without deciding whether the question was admissible in this case, we observe that the Recorder, having stopped it, was careful to point out to the jury that they must not let it prejudice the appellant; he made it plain that they must banish it from their minds. That is sufficient. There might be a case where the question asked is so serious in its application to the particular facts of the case that it might not be sufficient to tell the jury to banish it from their minds. When such a case arises the Court will deal with it, but here in the opinion of the Court the mischief was cured by the direction.

Then we come back to the first question. Counsel for the prosecution asked the appellant whether he and Madame Dyas

1915
26 *April.*

HYMAN KURASH.

Reading L.C.J.

were living together. It must be borne in mind that a defence put forward on behalf of the appellant was that he was a mere servant, and acted as assistant to Brenner, who was the auctioneer. Evidence was given by one of the police officers that after arresting appellant in the company of Madame Dyas he took him to the police station, where he said, with reference to another prisoner, Jacobs, "Don't charge old Bloater; I have only employed him two or three days." The appellant denied that he used exactly those words. If they were true, then he was not a mere servant. To confirm that the question is asked about the relations existing between him and Madame Dyas, who, according to the defence, was the proprietress of the business, entitled to the receipts, apportioning the commission and paying the wages; their relations were material and really relevant to the issue tried. *Rodley* is the most recent case on the point in which all the cases were carefully considered, and the following passage from *Fisher* was quoted: "The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that the prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character, and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence" (*per* Channell J.); then the Court said: "As here pointed out, the governing rule must always be that any evidence to be admissible must be relevant to the issue." It must be relevant to the issue and then it is admissible notwithstanding that it proves another offence. Nothing that is said to-day is intended to extend the principle. The only difficulty is in applying the principle to the facts of this case. The question whether the relations existing between the appellant and Madame Dyas could be proved depends on whether it assisted to establish the case made out, that he was not a mere servant but the employer, and that is confirmed to some extent by the relations between appel-

1915
26 *April.*

HYMAN
KURASH.

Reading
L.C.J.

lant and Madame Dyas. If so, it seems to us that it cannot be said that the question was not one relevant to the issue. The case is very close to that of *Chitson*, and is within the principle to which I have called attention. For these reasons in the opinion of the Court the conviction must stand.

We now come to deal with the sentence, and there are some matters to be taken into account in this case which we think are grounds for making a reduction. Apparently the appellant had never been convicted before, and this was the first time he had been charged. With regard to the other prisoners different considerations arise; taking these facts into account, and not omitting the important part which in our view he played in the matter, we think that each term should be reduced to twelve months, to run concurrently.

Sentence reduced.

Solicitors for the Appellant—*Edgar & Co.*

Solicitors for the Crown—*Wontner & Sons.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE LOW.

1915
3 *May.*

NATHANIEL CHARLES PLATT.

When sentence has been passed under a misunderstanding of relevant facts, the Court will give effect to what it believes would have been the judgment of the trial judge if he had been cognisant of the true facts.

This was an appeal against conviction and sentence by leave of Lawrence J. Appellant was convicted, at the Central Criminal Court, on the 25th March, 1915, before Mr. Commissioner Rentoul, of larceny as a servant, and was sentenced on the 30th March to six months' imprisonment in the second division.

Martin O'Connor, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. I only propose to argue the appeal against sentence. The appellant was convicted of stealing money from his employers, an approved society, in November, 1913; he joined the army in September, 1914. On conviction I appealed to the Commissioner to bind him over under the First Offenders Act; he said he would do so if he would be taken back into his regiment; I said the solicitor instructing me would write to his colonel, and he did write, and the adjutant replied that appellant would be kept in his regiment if he was bound over. The learned judge, when that reply was produced, said that the defence ought not to have communicated with the colonel, and, in sentencing the appellant, told him that had it not been for my conduct in causing a communication to be made to his commanding officer he would now be free. (He was stopped.)

[At the request of the Court a police officer was called who handed in the letter received by the police from the adjutant of the appellant's regiment, stating that he would be taken back into

1915
3 *May.*

NATHANIEL CHARLES PLATT.

Reading L.C.J.
Avory J.
Low J.

the regiment if bound over. He also stated that, in writing to make this enquiry, he had reported that in the view of the Commissioner the appellant's offence had been aggravated by his charge of perjury against two of the witnesses for the prosecution.]

Kingsbury, for the respondents, the prosecutors. The offence was a serious one; an elaborate system of fraud was adopted, and the appellant had to forge a doctor's name to obtain the money.

The LORD CHIEF JUSTICE: The appellant was convicted of the larceny of three separate sums of thirty shillings, which were said by him to have been paid out as maternity benefits, and he was sentenced to six months' imprisonment in the second division. He appeals against conviction and sentence, but Mr. O'Connor has not argued the question of conviction; we think quite properly; the evidence was clear, and there is no disputing the verdict. Counsel has argued that in the circumstances the sentence was too severe, and that the appellant ought to have been bound over under the First Offenders Act.

In this case it is sufficient to say that the thefts were committed in November and December, 1913, and that in September, 1914, the appellant enlisted and was serving in the army when the offences were discovered. The Commissioner was appealed to by Mr. O'Connor not to sentence the appellant until later to enable those acting for him to apply to his commanding officer, so that if he would, notwithstanding the appellant's conviction, take him back, the Commissioner should deal with him in such a way as to permit that course being taken. The Commissioner assented, and said that he would postpone sentence until the following Monday, and that if his commanding officer wanted him he would let him go. Evidently the difficulty the Commissioner felt was that the appellant had set up an untrue story and sworn to it, and had also suggested that other persons had told untruths in the witness box. It is only necessary to say, though not as minimising the offence, that these suggestions were made by the appellant in cross-examination when he was pressed. The Commissioner thought these facts ought to be presented to the commanding officer. When the appellant was brought up on the Monday no report in answer to their enquiry had been received by the police, but an answer

1915
3 *May.*

NATHANIEL CHARLES PLATT.

Reading L.C.J.

had been received to a letter written to the appellant's commanding officer by his solicitor. Some misunderstanding arose as to the course taken by the solicitor; the Commissioner thought that he ought not to have written because the Court had ordered the enquiry to be made. Evidently the direction of the Commissioner had not been understood at the time, and it is clear from the shorthand note that counsel suggested that the solicitor should communicate with the commanding officer in order to get an answer by the Monday. That statement did not reach the Commissioner. A question arose as to the propriety of sending the letter to the commanding officer, but it is plain that what happened could have and did have no bearing on the sentence to be passed. Sentence was again postponed to the following morning in order that an answer should be obtained to the police enquiries.

On the Tuesday the report was produced. We have here the enquiry made by the police at the direction of the Commissioner, stating the facts which he thought ought to be known by the commanding officer; and we have the reply from the adjutant stating that, notwithstanding the conviction, they were willing to keep the appellant in the regiment. Evidently the view of the Commissioner had been that on such a report from the military authorities he would be content to bind the appellant over, but he apparently thought that the report signed by the adjutant was not sufficient. It is clear that the matter had been submitted to the commanding officer, and that the adjutant replied for him. Consequently, carrying out what we believe to have been the Commissioner's own views, and accepting the report from the military authorities as sufficient, we reduce the sentence. The sentence of the Court is that the appellant be bound over for twelve months to come up to this Court for judgment if called upon, and that he enter into his own recognizance in the sum of £20 to the effect. In consequence he will be able to return to serve in his regiment. It must be borne in mind that this is the only charge made against him; the other indictments are only other ways of presenting the same facts. This lapse was before the appellant joined the army, so we are willing to give him this chance of retrieving his character.

Sentence reduced.

Solicitors for the Respondents—*Buchanan and Hurd.*

A. L. B. T.

ARTHUR BAKER.

1915
3 *May.*

Reading
L.C.J.
Avory J.
Low J.

Severity of sentence.

Despite many previous convictions, regard must be had to the triviality of the appellant's offence.

This was an appeal against conviction and sentence, by leave of Atkin J. Appellant was convicted, at the East Kent Sessions, on the 7th April, 1915, of obtaining money by false pretences, and was sentenced to five years' penal servitude.

L. S. Fletcher, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was a lance-corporal in the army, and the charge against him was that he obtained £2 from a man named Marienstrauss, a private in the same regiment, who was anxious to get out of the army, alleging that a certain Sergeant Brown could manage this and that he required the £2 as an inducement. The case for the appellant was that the money was for himself, and that he undertook to report the prosecutor to his lieutenant as being inefficient. It was admitted that he did so report him. He denied having ever mentioned Sergeant Brown; he said that he signed a receipt for the money in the name of Brown as he did not think that his officers would approve of the part he took in the transaction. The Chairman misdirected the jury by failing to tell them that they must find that the prosecutor was induced by the false pretences, and that they must be false pretences of an existing fact. He did say, "Was the prosecutor deceived by the prisoner's reference to one Brown?" which would have been correct by itself, but he also said, "Do you think that the prisoner did persuade Marienstrauss to let him have the £2 by false pretences, or that he would be able to assist to get him out of the army by means of the ordinary communication to his superior officer?" thus suggesting two alternative offences of which the jury might convict him, one of which was not suggested by the prosecution or covered by the indictment.

The sentence was too severe. It is the maximum for this offence. It is true that the appellant has a long list of convictions since 1907; in that year he lost his wife and both his children, which resulted in his taking to drink and then to crime. He has a remanet to serve of one year and ninety days from a sentence

1915
3 *May.*

ARTHUR BAKER.

Reading L.C.J.
Avory J.
Low J.

of five years' penal servitude passed in 1911. His conduct as a soldier was good; he had been recommended for promotion to sergeant after sixty days' service.

Roland Oliver, for the Crown.

AVORY J.: The appellant was convicted of obtaining £2 by false pretences and was sentenced to five years' penal servitude. The alleged false pretence of which he was convicted was that he could obtain the discharge of one Marienstrauss from the army through the agency of one Sergeant Brown, who would require the payment of a certain sum of money. The appellant said that he was asking £5 but would take £2. Marienstrauss swore that he paid that sum in the belief that Brown wanted it for the purpose. In fact there was no Sergeant Brown in the appellant's battalion, nor any other sergeant who could obtain his discharge. After some consideration, the Court is of opinion that there was sufficient evidence to be left to the jury that the £2 was obtained from Marienstrauss by false pretences with intent to defraud. The fact that no satisfactory explanation of a receipt signed "J. Brown" was given by the appellant, coupled with the evidence of Marienstrauss, makes it impossible for the Court to say that there was no evidence that the false pretences were made. The summing-up is undoubtedly open to criticism; it does not clearly point out that the jury must be satisfied that the prosecutor was induced to part with his money by means of the false pretences, nor in terms that they must be satisfied that there was an intent to defraud. But one sentence in the summing-up, "Was the prosecutor deceived by the prisoner's reference to one Brown?" we think must have been taken by the jury to mean "Was the prosecutor induced by the false pretences to part with his money?" Having regard to the defence raised it is clear that, if his conduct was as alleged by the prosecution, there must have been an intent to defraud; so the Court cannot say that there has been any miscarriage of justice.

With regard to the sentence, as the Court has frequently said, whatever may be the appellant's character, regard must always be had to the nature of the offence. He must not be sentenced to penal servitude merely because he has been so sentenced before.

1915
3 *May.*

ARTHUR BAKER.

Avory J.

The Court is disposed to take the view that this offence was of a trivial character. There is no doubt that Marienstrauss was anxious to get out of the army, and was of very little use in it. No doubt the appellant as a corporal was in a position to call the attention of his officer to the fact that Marienstrauss was not efficient, and the Court is satisfied that he did in fact do so; the lieutenant made a note in his book, and in consequence Marienstrauss has been put on orderly duty, the only thing he is fit for. It may be that the appellant, to get the £2, did make use of the name of Sergeant Brown. However reprehensible that may be, the offence was trivial in the circumstances. Having regard to the fact that the appellant was obviously a good soldier, having become a lance-corporal within sixty days of enlisting, and being on his way to the rank of sergeant, it is most unfortunate that he has fallen to the temptation of such a paltry sum. When we look at his previous record we find that he has been convicted on several occasions since 1906. He was then bound over, and in 1908 he was convicted in Toronto of obtaining money by false pretences and sentenced to three years' penal servitude, but after having served little more than a year he received a conditional pardon, conditioned on his leaving the country. In 1909 he received six months' imprisonment with hard labour for false pretences; in 1910, at the Liverpool Assizes, nine months' hard labour for forgery; in 1911 five years' penal servitude, at Liverpool Assizes, for forgery; and in 1914 three months' hard labour for false pretences. Notwithstanding this record, the Court is of opinion that the sentence ought to be reduced to six months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

1915
3 *May.*

THOMAS EVANS.

Reading
L.C.J.
Avory J.
Low J.

A Court of Quarter Sessions has no power to decide whether a person is an incorrigible rogue.

A person twice convicted of being a rogue and a vagabond does not thereby become an incorrigible rogue. He can only be so found by the committing justices.

This was an appeal against sentence, by leave of Atkin J. Appellant was sentenced as an incorrigible rogue to eleven months' imprisonment with hard labour, at the Oswestry Borough Sessions, on the 9th April, 1915.

H. H. Joy, for the appellant, who was present. Section 20 (2) of the Criminal Appeal Act gives a special right of appeal in this case. The appellant came before the Oswestry justices on the 18th March, 1915, on a charge of loitering in a place of public resort with intent to commit a felony; he was found guilty and convicted under s. 4 of the Vagrancy Act, 1824 (5 Geo. 4, c. 83), as amended by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 15, and the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 7, as a rogue and vagabond. Under s. 5 of the Vagrancy Act, 1824, when a person is so convicted who has been at some former time convicted of being a rogue and vagabond, he "shall be deemed an incorrigible rogue within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to remain until the next general or quarter sessions of the peace; and every such offender who shall be so committed to the house of correction shall be there kept to hard labour during the period of his or her imprisonment." Then under s. 10, "When any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the house of correction, and be there kept to hard labour for any time not exceeding one year from the

making of such order." In the present case the justices at petty sessions found that the appellant had been convicted of being a rogue and vagabond at Lincoln on the 23rd December, 1914; they did not, however, convict him of being an incorrigible rogue, but they ordered him to be imprisoned until the next Oswestry quarter sessions, "to be then and there further dealt with according to law."

At the quarter sessions some evidence was heard, and then, according to the record which recites that "Whereas Thomas Evans became an incorrigible rogue within the meaning of the statute," the Court adjudged him to be an incorrigible rogue, and sentenced him to eleven months' imprisonment with hard labour.

I submit that, in the absence of a conviction at petty sessions as an incorrigible rogue, the Court of quarter sessions had no power to deal with the appellant; such a conviction is a condition precedent to the right to pass sentence. The words "being thereof convicted" in s. 5 of the Vagrancy Act, 1824, mean convicted of being an incorrigible rogue. See *Ex parte Reed*, 22 J. P. 271 (1858).

Further, the Court of quarter sessions had no power to convict the appellant of being an incorrigible rogue; its power is limited to passing sentence, and the witnesses must be heard at petty sessions. There is no appeal against conviction to this Court because it is not a conviction at quarter sessions: *O'Brien*, 2 Cr. App. R. 193 (1909).

Lastly, the justices wrongly convicted the appellant of being a rogue and vagabond because, although they heard evidence that he had been loitering with intent to commit a felony, they heard no evidence to shew that he was a suspected person or convicted thief under s. 15 of the Prevention of Crimes Act, 1871. This Court can enquire into this, for it can interfere if the record shews on its face that the conviction is bad: *Johnson*, [1909] 1 K. B. 439; 78 L. J. K. B. 290; 100 L. T. 464; 73 J. P. 135; 53 S. J. 288; 25 T. L. R. 229; 2 Cr. App. R. 13. In *Evans and Connor*, 10 Cr. App. R. 53 (1914), the Court considered a matter which did not appear on the face of the record. If it appears on material before the Court that the conviction as a rogue and vagabond could not be supported, the Court would not support a sentence to which it is a condition precedent.

1915
3 *May.*

THOMAS EVANS.

Reading L.C.J.
Avory J.
Low J.

Roland Oliver, for the Crown. The last point cannot be taken here; it is an appeal against conviction which does not lie to this Court: *Brown*, 1 Cr. App. R. 85; 72 J. P. 427 (1908). There is a right of appeal to quarter sessions under s. 14 of the Vagrancy Act, 1824. In any case the Prevention of Crimes Act, 1871, does not limit, but rather extends, the words of the principal Act. Evidence was given here that the appellant was seen attempting to pick pockets—that is, of a particular "act" within s. 15.

On the main point it is not necessary that there should be a conviction as an incorrigible rogue on the record at all. If certain facts are proved and recorded the law itself confers a certain status on the prisoner, and says that he is deemed to be an incorrigible rogue. "Being thereof convicted" should not be read too literally; it only means convicted for the second time of being a rogue and vagabond. According to the report of *Johnson* in 2 Cr. App. R. and 73 J. P., which differs from that in the Law Reports, this very question is reserved. I admit that the Court of quarter sessions had no power to convict the appellant of being an incorrigible rogue, but I rest my case on what happened at the petty sessions.

Joy, in reply.

The LORD CHIEF JUSTICE: The appellant was convicted of offences under the Vagrancy Act, 1824, and according to the record of the Court of quarter sessions he was adjudged by that Court to be an incorrigible rogue, and then sentenced to eleven months' imprisonment with hard labour. He appeals to this Court against his sentence, and it has already been decided that on such an appeal we have to consider whether the sentence was justified; so we must see whether on the face of the record there is anything to warrant the sentence passed.

Under the Vagrancy Act, 1824, s. 4, it shall be lawful when a person is convicted of being a rogue and vagabond within the meaning of the statute to sentence him to imprisonment with hard labour for three calendar months. Under s. 5, upon the happening of certain conditions there prescribed, one of them being that of a person who has been convicted of being a rogue and vagabond being again convicted as a rogue and vagabond, the justices of the peace may convict the offender of being an in-

corrigible rogue and commit him to a house of correction until the next quarter sessions, and then the Court of quarter sessions has the right to sentence him to imprisonment with hard labour for a period not exceeding twelve months. In s. 5, the words which are material to this case are, "It shall be lawful for any justice of the peace to commit such offender," that means for the purposes of this case a person convicted twice of being a rogue and vagabond, "(being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses)." The point arises here that on the face of the order the justices apparently convicted the appellant of having been twice found to be a rogue and vagabond, but did not convict him of being an incorrigible rogue. That is the order which comes to the Court of quarter sessions. That Court has no power under the statute to enquire whether a person is an incorrigible rogue or not. All it can do is to look to the record and see if he has been convicted as an incorrigible rogue. This is not merely a technical point. It does not necessarily follow that, because a person is convicted a second time as a rogue and vagabond, he is therefore convicted of being an incorrigible rogue. The justices may convict him of being an incorrigible rogue, but they may take the view that the second offence is so trivial that they do not propose to send him to quarter sessions, but inflict a sentence of three months as a rogue and vagabond.

Apparently from the record in this case he was convicted on the 10th March, 1915, at the Borough of Oswestry, and sentenced to be imprisoned with hard labour at Shrewsbury until the next quarter sessions, and the order recites that on the 23rd December, 1914, he was convicted at Lincoln of being a rogue and vagabond; therefore, on the face of the record, there is no record of conviction as an incorrigible rogue. The words of the statute make it plain that it is a condition precedent to the power of quarter sessions to impose sentence that the offender shall have been convicted as an incorrigible rogue, and as the condition precedent does not appear here the Court of quarter sessions had no jurisdiction to deal with the case. That Court was apparently pressed by the difficulty, because what it purported to do, after reciting in the record "Whereas Thomas Evans became an incorrigible rogue within the meaning of the Act," was to adjudge him to be an incorrigible rogue. The Court of quarter sessions had no jurisdic-

1915
3 *May.*

THOMAS EVANS.

Reading L.C.J.

tion to adjudge him to be an incorrigible rogue, so that part of the order is bad. It follows that there was no conviction to justify the sentence, and therefore the sentence cannot stand.

The view of the Court is supported by *Johnson*, where, on a similar argument, though not on the same facts, Lord Alverstone C.J. said: "If the section stopped after the words 'rogue and vagabond,' there would in this case have been an offence committed for which the appellant might have been convicted as an incorrigible rogue, but s. 5 goes on to say, 'such person having been at some former time adjudged' to be a rogue and vagabond 'and duly convicted thereof,' and it follows, therefore, that in order to justify a conviction of a person of being an incorrigible rogue he must have been previously adjudged to be a rogue and vagabond and duly convicted thereof." It was not necessary for the Court in that case to go further and deal with the point before us, but in principle it follows from what I have read. It must appear on the record that he has been convicted as an incorrigible rogue before sentence can be passed.

With regard to the other point raised, it is sufficient to say that the first point decides the case; the other point is, therefore, not decided by us, and can be raised hereafter if necessary.

Sentence quashed.

Solicitors for Appellant—*Philip Baker & Co.*, Birmingham.

A. L. B. T.

JOHN AUBREY.

On an indictment for receiving stolen property with guilty knowledge, there is no onus *on the defendant to prove that he received the property honestly.*

This was an appeal against conviction on a point of law. Appellant was convicted, at the Cardiff City Sessions, on the 9th April, 1915, of feloniously receiving stolen property, and was bound over to come up for judgment if called upon.

G. N. W. Thomas for the appellant (under s. 10 of the Criminal Appeal Act). The appellant was found in the possession of pro-

1915
3 *May.*

JOHN AUBREY.

Reading L.C.J.
Avory J.
Low J.

perty which had been recently stolen, and gave an account how it came into his possession, but the Recorder misdirected the jury as to the *onus* of proof in such a case. He said: "If goods are recently stolen and found in the possession of another the *onus* is shifted. . . . . In the case of a receiver of stolen goods he must satisfy you that he came by those goods honestly." (He was stopped.)

J. A. Lovat Fraser for the Crown. The Recorder clearly overlooked the decision of the Court in *Schama and Abramovitch*, 84 L. J. K. B. 396; 59 S. J. 288; 31 T. L. R. 88; 11 Cr. App. R. 45 (1914). The jury might have convicted the appellant on the evidence, but I must admit that it was extremely thin.

Low J.: The Recorder, in directing the jury, told them that in the case of a receiver of goods which had been recently stolen, the prisoner must satisfy them that he came by the goods honestly. It is not necessary to go into further points that might arise on the summing up. It is clear that on that direction the jury may have taken the view that they were bound to convict the appellant. The case itself was exceedingly weak, and it might well have been that the jury, if not so directed, would have formed a different opinion. It is very likely that the Recorder had not seen the case of *Schama and Abramovitch*. The Court is of opinion that it is impossible that this conviction should stand.

Conviction quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE LOW.

ERNEST DOUGLAS.

1915
10 *May.*

Severity of sentence.
The triviality of an offence may mitigate the effect of previous convictions.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted, at the Surrey Sessions, on the 6th April, 1915, of obtaining money by false pretences, and was sentenced to three years' penal servitude.

Appellant in person.

P. Strickland, for the Crown. The sentence was in respect of both charges, and of a third one pending.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to two indictments: the first for obtaining two shillings by false pretences, the second for obtaining credit by false pretences to the extent of twenty-four shillings from a constable with whom he was residing. He was sentenced on the first indictment to three years' penal servitude. He was lodging with the constable and his wife, to whom he made a statement that he belonged to a company of the R.A.M.C. stationed at Redhill. He borrowed two shillings from the wife, stating that he was going to obtain his pay from Redhill. That company was not at Redhill and he was not stationed there. He was, in fact, a deserter from Witham, Essex. The Chairman took into account a serious list of previous convictions for similar offences, and a warning given at the time of his last conviction that he would be sent to penal servitude if he were convicted again. Further, there was pending against the appellant a charge of obtaining credit by false pretences at

1915
10 *May.*

ERNEST DOUGLAS.

Reading L.C.J.

Southend, which he asked to have taken into consideration; this was done.

In his application to the Court he said that he had given himself up voluntarily, but it is clear that the sergeant found him and induced him to accompany him back. Moreover, he stated that at the time he had money in the Post Office Savings Bank; he says that it was inherited by him and his wife in 1902, and that it passed into his own name in 1906 when his wife died. He says that he tried to withdraw this sum, and meant to repay with it the money borrowed. He added that he paid thirty shillings into the account in December last. The Court has had enquiries made, with the result that it is clear there was no such account in his name. If the facts he has stated were true, the Court would act differently in the matter. Now we have merely to take into consideration the offence and his previous character. We have often said that the sentence must have regard to the nature of the offence. In every year since 1910 the appellant has been convicted for obtaining money by false pretences. He has received various sentences of six months' and one of nine months' hard labour for this offence. The conclusion of the Court is that, notwithstanding these previous convictions, the sentence is too severe, and it must be reduced to twelve months' imprisonment with hard labour dating from the date of conviction.

Sentence reduced.

A. L. B. T.

WALTER LUCIEN BAIRD.

On a charge of obtaining by false pretences or fraud, evidence of similar conduct by the defendant to that charged is only admissible in so far as it tends to prove the specific intent to defraud alleged (by showing systematic dishonesty), and when such evidence has been given there ought to be an express direction to that effect. If the similar transactions did not amount to criminal offences (semble), *they cannot be given in evidence.*

On the trial of such indictments, the foundation for the admission of evidence of similar transactions should be laid by proof of the facts in issue.

This was an appeal against conviction on points of law. Appellant was convicted, at the Margate Borough Sessions, on the

1915
10 *May.*

WALTER LUCIEN BAIRD.

Reading L.C.J.
Avory J.
Low J.

12th April, 1915, of obtaining credit by fraud, and was sentenced to two months' imprisonment with hard labour.

W. T. Snell, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13, of obtaining credit for the purchase of a motor bicycle by fraud; the first ground of appeal is that evidence was improperly given of offences other than that disclosed in the indictment. One Poxon gave evidence that the appellant had obtained from him a motor bicycle without paying for it. His evidence does not point to any offence having been committed; or if it does, it was larceny by a trick or larceny as a bailee. Further, Poxon was the first witness called, and gave his evidence before any evidence of the offence for which the appellant was on trial was given. One Dennis gave evidence that the appellant had obtained a camera on credit; no false pretences were alleged, and the evidence disclosed no offence, but it was most prejudicial to the prisoner and inadmissible within the judgment in *Fisher*, [1910] 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176.

Secondly, questions were put to the appellant tending to shew that he had committed offences other than that with which he was charged, contrary to the provisions of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f). The questions were not admissible on any of the grounds dealt with in *Ellis*, [1910] 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 22 Cox C. C. 330; 26 T. L. R. 535; 5 Cr. App. R. 41. The suggestion was that he owed money to various tradesmen.

Lastly, the Recorder failed properly to direct the jury on these questions; he should have told the jury that they were bound by the answers given by the appellant. He did not tell them that they must be satisfied that there was an intent to defraud. The fraud relied on by the prosecution was that the appellant never had any intention to pay for the bicycle; I asked the prosecutor, Jebb, if he suggested that there was any fraud on the part of the appellant when the bicycle was handed over to the appellant, and he answered, "How could there be?" He had already stated that he gave him credit till the following morning.

1915
10 *May.*

WALTER LUCIEN BAIRD.

Reading L.C.J. Avory J. Low J.

L. S. Fletcher, for the Crown. I opened this case to the jury on the lines laid down by Lord Russell C.J. in *Jones*, [1898] 1 Q. B. 119; 67 L. J. Q. B. 41; 77 L. T. 503; 46 W. R. 191; C. C. R., in which he said there were three elements to be considered in the construction of this section, and after dealing with the questions whether there was an incurring of a debt or liability, and whether there was an obtaining of credit, said: "Thirdly, was there fraud? There was a debt, and there was credit, and we think there was ample evidence to justify the jury in arriving at the conclusion that the defendant was guilty of fraud. He goes to an eating-house, where the ordinary custom is to pay directly after the goods have been consumed; he knows that such goods are supplied, not on personal knowledge, but on the understanding that the ordinary custom will be observed. The jury found he had no intention of paying; he intended to cheat, and so the jury found." The questions in cross-examination to which exception is taken were as to the appellant's debts; they were put to rebut the case for the defence that he had authority from his parents to pledge their credit, and that they had met his bills before; my suggestion was that if this was true these liabilities would have been discharged. The jury are not bound by the appellant's answers; they may be affected by his demeanour and disbelieve him: *Christie*, [1914] A. C. 545 (*per* Lord Atkinson, at p. 554); 109 L. T. 746; 78 J. P. 141; 30 T. L. R. 41; 10 Cr. App. R. at 149 and 155.

The evidence of Poxon and of Dennis was admissible, even if it disclosed no offence. In *Ollis*, [1900] 2 Q. B. 758; 83 L. T. 251; 49 W. R. 76; 64 J. P. 518; 19 Cox C. C. 554; C. C. R., evidence was held admissible of matters on which the prisoner had just been tried and acquitted. If the transaction is *ejusdem generis* with that which forms the subject of the indictment, evidence of it is admissible; the offences spoken to by these witnesses were of a similar character even if the technical description of the offence is different. The expression used by Channell J. in *Ellis* is "the same kind of transaction," not "the same offence."

The Recorder properly directed the jury; his closing words were, "If you think you ought to say he had formed an intention of not paying for it, then you will say he is guilty. But if you find that he had not that deliberately dishonest intention, that he

1915
10 *May.*

WALTER LUCIEN BAIRD.

Reading L.C.J.
Avory J.
Low J.

was going to pay for it himself or was going to have it paid for him, then you will be entitled to say he is not guilty."

The evidence was called in chronological order, and that is the reason why Poxon gave his evidence first.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment which charged him with obtaining credit by fraud, and he was sentenced to two months' imprisonment with hard labour. He appeals against his conviction on points of law. The transaction in question was with one Jebb, and it appears that the appellant, a lad of nineteen or twenty, bought a motor bicycle from Jebb, promising to pay him the first thing the next morning. The fraud charged is that he had, at that time, no intention of paying for it. He said that he knew he could not, but his defence was that he was buying in the belief that his parents would pay for it, and, further, that he was expecting when he came of age to come in to a small sum of money. He was allowed to ride away on the bicycle, and eventually, as he did not pay for it nor return it, proceedings were taken.

The first point relied on for the appellant is that evidence was wrongly admitted of two other transactions which it is said were not relevant to the charge that was under investigation. One was a transaction with Poxon about a motor bicycle, and the other with Dennis about a camera, and in both cases he failed to pay for the articles. The circumstances in these cases were certainly peculiar, and. in the opinion of the Court, would not have justified in either case a criminal charge. They were used for the purpose of proving the intent to defraud, and it is only in that way that they could be relevant. Whether they are evidence of intent depends on whether they are evidence of similar transactions, and when the facts are investigated the Court is of opinion that neither of them was a similar transaction to the one under trial, and, therefore, evidence of them was inadmissible. The law on the subject is clearly stated in *Ellis*, in which the following passage is quoted from *Fisher*: "We are of opinion that the evidence as to the other cases was inadmissible in this case, because it was not relevant to prove that he had committed the particular fraud for which he was being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, if

1915
10 *Mar.*

WALTER LUCIEN BAIRD.

Reading L.C.J.

all the other cases had been frauds of a similar character, shewing a systematic course of swindling by the same method, then the evidence would have been admissible." Moreover, with regard to these cases it is noteworthy that the first witness called was not Jebb, as would have been expected, but Poxon. There was some discussion about the admissibility of the evidence, and it was made plain that it was being used as a case of obtaining credit by fraud, according to the view of the prosecution. Poxon's evidence was given, and then Jebb's. It is unfortunate that the evidence was given in that way; we are told it was done to keep it in chronological order, but in keeping the facts in this order a wrong impression may well have been created in the minds of the jury. It must be borne in mind that in such cases the mere fact that credit is given and no payment made, even if it occurs in several instances, is not enough; there must be an intention to defraud, and where two such cases are given in evidence, even if, as the Recorder thought, they were admissible, he should have directed the jury that the evidence is only given to prove intent to defraud in the case before them. Not only was that not done, but the Recorder, in dealing with Poxon's evidence, stated the substance of it and began his summing up with it. The jury may well have thought that Poxon's was one of the cases which they were trying. The Recorder ought to have told them not to allow the case to influence their minds unless they were satisfied that there was there an intent to defraud, and then only to prove the intent in Jebb's case. It is impossible to allow the conviction to stand, and it is right to say that the Recorder was evidently in favour of an acquittal.

Conviction quashed.

A. L. B. T.

ARTHUR SIDNEY BARKER AND WILLIAM HENRY PAGE.

1915
10 & 11 *May.*

Reading
L.C.J.
Avory J.
Low J.

The Court will quash a conviction when the only evidence of guilt is an answer to the charge which may or may not be construed as an admission.

On a trial for receiving the point that there is no proof that the goods have been stolen ought to be distinctly taken at the trial.

If the Court thinks that there was sufficient evidence of a larceny, even though some evidence given thereof was inadmissible, it will not quash the conviction.

Proviso to s. 4 (1) of the Criminal Appeal Act applied in such a case (where invoices received by an agent in this country from consignors abroad were admitted as evidence of the contents of a case landed in England).

These were appeals on points of law, and applications for leave to appeal against sentence. Appellants were convicted, on the 12th April, 1915, at the Folkestone Borough Sessions, of feloniously receiving stolen property. Barker was sentenced to twelve and Page to nine months' imprisonment with hard labour.

Pitman, for the appellants, of whom Barker was present, but not Page. The appellant Page was charged in one indictment with two men, Spicer and Andrews, with stealing some five hundred watches; Barker and a man named Bridges were charged, each in a separate indictment, with receiving some of them knowing them to have been stolen. It was found at the trial that three separate indictments had been prepared, so three trials had to be held. Page, Spicer and Andrews were tried first and Bridges last. The first indictment was for larceny with the usual count for receiving, but the prisoners were never asked to plead to the second count, nor were they put in charge of the jury on that count. The other two indictments were for receiving only. The same jury tried each case. The first case was summed up to the jury as a case of stealing, but at the end of the summing up Mr. Dickens, who appeared for the Crown, asked the Recorder to tell the jury that they could convict of receiving, and he said, "That is so." Such a conviction cannot be upheld.

The watches in question had been sent from Switzerland, viâ Dieppe to Folkestone, where they were missed. The only evidence against Page was that he was working on the pier on the 17th February, the day when the watches were said to have been stolen, and that of a police officer who went to arrest Page; he said, "I

1915
10 & 11 *May.*

ARTHUR SIDNEY BARKER AND WILLIAM HENRY PAGE.

Reading
L.C.J.
Avory J.
Low J.

went to 16, Rossendale Road, where I saw the prisoner Page. I told him we were police officers, and cautioned him. I then told him he would be charged with other men in stealing several ladies' wristlet watches from Folkestone Pier on or about the 3rd February. I told him I had recovered two from Mr. Bridges, the landlord of the Martello Hotel, out of the twenty-four which he had sold to him. He replied, 'All right.'" He was asked to give his exact words, and said, "I said Mr. Bridges has handed me two watches out of the twenty-four you have sold him and they are stolen. He replied, 'All right.'" This was not an admission of the truth of Bridges's story. (The date of the robbery was originally supposed to be the third of February.) I was only defending the other two prisoners, Bridges and Barker, but in the interest of Bridges I submitted at the trial that there was no evidence against Page to go to the jury; the Recorder said that I could not interfere, and refused to withhold the case from the jury.

With regard to Barker, the case for the prosecution was that Page sold thirty watches to Bridges, and Bridges sold twenty-eight to Barker, who was a working jeweller. It was said that the watches were worth 17*s.* 6*d.* or £1, and were bought by Barker for 2*s.* 6*d.* and sold to various watchmakers for 6*s.* 6*d.* or 7*s.* 6*d.* Barker's account was that he bought them from Bridges, a most respectable man, who said he had bought them as traveller's samples, and that some of the watches were knocked about. Bridges was tried after Barker and acquitted. Barker on arrest made false statements as to where he got the watches, but he explained that he did not want to give away his market.

Evidence was given that certain cases were put on the boat at Dieppe, but two of them were missed before they reached London. The only evidence given of the contents of these boxes was the invoices received by the witness from the consignors abroad. This was only secondary evidence, and was, therefore, inadmissible.

H. C. Dickens, for the Crown. I did not notice that the receiving charge had not been put to the appellant Page. I opened the case as a case of receiving, and told the jury they must consider it on the lines of the decision in *Schama and Abramovitch*, 84 L. J. K. B. 396; 59 S. J. 288; 31 T. L. R. 88; 79 J. P. 184; 11 Cr. App. R. 45 (1914). It was for the jury to say

1915
10 & 11 *May*.

ARTHUR SIDNEY BARKER AND WILLIAM HENRY PAGE.

Reading L.C.J.
Avory J.
Low J.

whether Page's answer to the police officer was an admission or not; their verdict shews that they thought it was.

As to Barker's case, I made it clear to the jury that the invoices were no evidence of the contents of the cases. One invoice referred to three cases, numbered 573, 4, and 5. The first two arrived safely and contained watches, number 575 was missing; the jury were entitled to draw the inference that that case contained watches also. Immediately after the case was missed a number of watches of the very kind expected were being dealt with in Folkestone. A witness proved that these watches were made by his firm, the Langendorff Watch Company, whose factory was in Switzerland, and that no one had a right to deal with them at Folkestone. Also, he identified some of them as being the first of a new pattern to be made by his firm and sent to England. The other missing case was numbered 37 and was proved to have arrived at Folkestone. It was proved that the watches were punched "L.J." at the Assay Office, Birmingham, before being sent in a rough state to Switzerland to have the works put in, and the punch was produced. L. J. were the initials of the firm to which the watches belonged and which, it was proved, had ordered watches of this kind to be sent from Switzerland shortly before February 17. A watch of the same kind and bearing this mark was found on Barker on arrest. There was, therefore, ample evidence of the contents of the cases apart from the invoice.

Pitman. The invoices were clearly put forward as evidence of the contents of the cases. I cannot say that I objected to the evidence. The jury had already in the previous case found that the watches had been stolen, and the main issue at Barker's trial was that of guilty knowledge. I raised the point, however, in cross-examination.

The sentence was excessive; the appellant had not been convicted before. The Recorder in sentencing him said that there was no evidence that his character was good; he should have assumed it unless there was evidence to the contrary.

The LORD CHIEF JUSTICE: The appellant, William Henry Page, was convicted of receiving a number of ladies' wristlet watches, and was sentenced to nine months' imprisonment with hard labour; he appeals against his conviction. He was indicted, with two other

1915
10 & 11 *May.*

ARTHUR SIDNEY BARKER AND WILLIAM HENRY PAGE.

Reading L.C.J.

prisoners, Spicer and Andrews, for stealing and receiving two cases of watches. Spicer and Page were convicted; Andrews was acquitted. The case against Page rested on answers given by him to a police officer who put certain questions to him, and except for the fact that he was at work in the ordinary course of his employment, helping to discharge goods from the vessel which contained the cases on its arrival at Folkestone from Dieppe, there is no other evidence against him at all. The fact that he was employed there was not evidence of his guilt. In the view we take of the evidence it is not necessary to deal with the other points raised on his behalf.

The evidence under discussion is that of a detective-sergeant who was concerned in investigating the theft; he saw Page, told him he was a police officer, and gave him the usual caution. He then said, according to his evidence, "I then told him he would be charged with being concerned with other men in stealing several ladies' wristlet watches from Folkestone Pier on or about the 3rd February. I told him I had recovered two from Mr. Bridges, the landlord of the Martello Hotel, out of the twenty-four which he had sold to him. He replied 'All right.'" The detective-sergeant was told to give the exact words, and then went on to repeat, "I said Mr. Bridges has handed me two watches out of the twenty-four you have sold him, and they are stolen." Page, who was not represented at the trial, interrupted and said, "You did no such thing." The witness continued, "He replied, 'All right.'" That is the whole of the evidence. The Recorder dealing with it seems to have regarded it as an answer to the charge, for he said, "Johnson has an interview with Page and he tells him of his interview with Bridges, and says, 'I have recovered twenty-two watches from Mr. Bridges of the Martello Hotel out of the twenty-four which Mr. Bridges says you sold him.' That is what Johnson says to Page after cautioning him. He also told him that he would be charged with two other men with stealing a quantity of ladies' wristlet watches from Folkestone Pier. Page replies, 'Oh, all right.'" In whatever way one looks at it it is plain that it was admissible evidence, but the point we have to consider is whether it is of any value by itself. By itself it is equally consistent with innocence or guilt; it might merely mean that he would go to the police station. We cannot come to the conclusion that it was an admission of the offence. Having

1915
10 & 11 *May.*

ARTHUR SIDNEY BARKER AND WILLIAM HENRY PAGE.

Reading L.C.J.

decided that the evidence is as susceptible of an innocent as of a guilty explanation, we form the conclusion that there is no sufficient evidence to justify the conviction; that on such evidence alone it is not right that the appellant should be convicted. The jury were told at the last moment that he could be convicted of receiving, although he had only been given in charge of the jury for stealing. The charge of receiving was never put to or pleaded to by him, but there is now no necessity to consider the effect of this irregularity.

The Court will take time to consider its judgment in Barker's case.

17 *May.*

On the 17th May the following written judgment was delivered by the LORD CHIEF JUSTICE:—

The appellant was convicted of receiving from one Bridges twenty-two watches well knowing them to have been stolen. The ground of the appeal is that two invoices were improperly admitted as evidence of the facts stated therein, and that, excluding such statements, there was no evidence that the goods were stolen property.

The case for the prosecution was that these watches were part of the contents of a case, number 575, one of three cases of watches forwarded by the Langendorff Watch Company, manufacturers in Switzerland, to their agent in London. It was proved that on February 17th, 1915, case number 575 was, with cases numbers 573 and 574, shipped on the S.S. "Sussex" at Dieppe for carriage to Folkestone. On the same day cases numbers 573 and 574 were checked ex ship to the railway van at Folkestone Harbour and were forwarded to and received at London by the agent for the manufacturing company. Case number 575 disappeared. Although it was unshipped at Folkestone, it was never delivered to the railway van at Folkestone Harbour and never arrived in London. The agent of the manufacturing company was called and an invoice was put to him and identified by him as one received by him from the manufacturing company. It contained statements that cases numbers 573, 574 and 575 had been shipped to him, and that there were watches in boxes and with detailed particulars of the different classes of watches. These statements were clearly not admissible as evidence of the contents of number 575, and did not establish that the watches produced

1915
17 *May*.

ARTHUR SIDNEY BARKER AND WILLIAM HENRY PAGE.

Reading L.C.J.

were part of the contents of number 575. There was, however, other evidence. The agent identified the watches produced in Court which had been found upon or traced to the appellant as watches manufactured by his company. He knew the character of the watches and of the boxes used by his company, and was positive that these goods were made and shipped by his principals. All watches sent to this country would be received by him before being delivered to customers or otherwise dealt with. Some of the watches produced were the first of that particular pattern made by his principals, the manufacturing company. This evidence was to the effect that such watches must have been stolen. Having regard to this evidence, we cannot say that there was no evidence that the watches produced had been recently stolen, neither can we say that there was no evidence that they were part of number 575 which had disappeared.

From the conduct of the case at the trial it appears that there was no formal objection to the admission of the invoices at the trial and no submission was made that there was no evidence that the goods had been stolen. The point had been raised by Mr. Pitman unsuccessfully in the preceding trial of Page and other persons relating to the theft of the watches. He was not appearing for any of the persons charged in that case, they were undefended. He raised his objection in the interest of Barker and Bridges, whom he was defending. When Barker's case was being tried, it must be remembered that the jury had just convicted two persons of receiving the watches knowing them to have been stolen, and it was no doubt awkward for Mr. Pitman to raise the point again at the trial of Barker.

From a careful examination of the trial it appears to us that the case was fought on the issue of the guilty knowledge of Barker, and that there was no substantial contest as to the theft of the watches. There was, as we have said, evidence that the watches were stolen and ample evidence from which the jury were entitled to infer that the appellant knew it. He was a working watch repairer and jeweller and knew the value of such watches, the prices both of purchase and sale, and his conduct in telling falsehoods to account for his possession of the watches was evidence which justified the jury in their verdict. We think that the jury would have arrived at the same conclusion if these invoices had been excluded from their consideration. We are, therefore, of

1915
17 *May.*

ARTHUR SIDNEY BARKER AND WILLIAM HENRY PAGE.

Reading L.C.J.

opinion that, notwithstanding the wrongful admission of evidence, there has been no substantial miscarriage of justice, and the appeal must be dismissed.

On the question of sentence, we have come to the conclusion, acting on the usual principle of this Court, that there is no reason for interfering.

Page's case—*Conviction quashed.*

Barker's case—*Appeal dismissed.*

Solicitor for the Appellants—*G. W. Haines*, Folkestone.

A. L. B. T.

HENRY SANDERSON.

When a defendant is committed for trial, it is desirable that any previous conviction proved in the preliminary proceedings should not be reported.

This was an application for leave to appeal against sentence. Appellant was convicted on the 21st April, 1915, at the Central Criminal Court, before the Common Serjeant, of selling counterfeit coin, and was sentenced to five years' penal servitude.

G. St. John McDonald for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant appeared at the police court on the 13th April, and at the end of the case against him a police inspector gave evidence that he had previously been convicted of a coining offence, for which he was sentenced to five years' penal servitude. This was reported in the daily papers on the following morning, and the report was headed, "Florins for sale at eightpence each." It is most likely that this was seen by some of the jury, in which case the appellant cannot have had a fair trial. It is contrary to the Previous Conviction Act, 1836 (6 & 7 Will. 4, c. 111), which has never been repealed. Sect. 37 of the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), enacts that it is sufficient to put in a certificate of the previous conviction in such cases.

[AVORY J.: Evidence must be given identifying the prisoner with the person mentioned in the certificate.]

1915
17 *May.*

HENRY SANDERSON.

Reading
L.C.J.
Avory J.
Low J.

The Evidence Act, 1851 (14 & 15 Vict. c. 99), says the same thing. This Court has dealt with the question of the disclosure of previous convictions in *Lee*, 1 Cr. App. R. 5 (1908); *Warner*, 1 Cr. App. R. 227 (1908); *Hargreaves*, 6 Cr. App. R. 97 (1910); and *Hemingway*, 8 Cr. App. R. 47; 29 T. L. R. 13 (1912).

Low J.: The ground of appeal in this case is that before the magistrate evidence of the appellant's previous conviction was given, and it is stated that this fact was mentioned in the reports which appeared in some of the daily papers. It is not suggested that any such evidence was given before the jury. In the opinion of the Court this application is a frivolous one. The evidence was perfectly clear. The evidence of the previous conviction which was given at the police court was relevant to a charge on which the appellant was committed for trial, although it was not the indictment on which he was tried. The Court is clearly of opinion that this appeal must be dismissed, but it is right to say, apart altogether from the present case, that it is an extremely undesirable practice for papers to publish any reference to the evidence of a previous conviction in cases which are committed for trial. It is desirable that the press should take notice of this, and should refrain from mentioning such evidence in its reports.

Application dismissed.

A. L. B. T.

HENRY TAYLOR.

Case stated.

There is no appeal by way of case stated (under the Crown Cases Act, 1848, 11 & 12 Vict. c. 78), from the special verdict of "guilty but insane."

Appellant was tried at the Worcester County Sessions on the 12th April, 1915, on a charge of unlawful wounding, and was found to be guilty of the acts charged but insane at the time.

The case stated was as follows:—

1. The defendant was tried before me on April 12th, 1915,

1915
17 *May.*

HENRY TAYLOR.

Reading L.C.J.
Avory J.
Low J.

at the Worcestershire Quarter Sessions, on a charge of unlawfully wounding, when the jury found a special verdict of guilty but insane.

2. Notice of appeal was given by the prisoner against the latter portion of this verdict, but as the decision in *Rex* v. *Felstead* was considered to preclude him from appealing on any such ground, I have thought it only fair to state a case for the opinion of this honourable Court on the procedure which was adopted at the trial.

3. A copy of my notes of the evidence taken at the trial, and the observations I had written on the assumption that the appeal would be heard and determined under the provisions of the Criminal Appeal Act, accompany this case.

4. Henry Taylor has, during the past two years or thereabouts, been a certified lunatic in the Powick Asylum in the County of Worcester, and the assault which was the subject of the charge made against him took place whilst an inmate of the asylum.

5. Prior to the trial taking place, Mr. Riley-Pearson, who had been retained by the Court to look after the prisoner's interests for the defence, expressed a wish on behalf of the accused that he should, prior to the trial, be examined by two medical men, of whom one should be Dr. Martin, a county magistrate present at the Sessions, and the other Dr. Hughes, medical superintendent of the Barnaby Hall Asylum, who had had a long and varied experience in mental cases. The result of Dr. Hughes's examination appears in the evidence, and there is no reason to suppose that Dr. Martin in any way differed in opinion, though he was not called.

6. On the case coming on for trial, neither of the counsel raised any objection as to the competency of the prisoner to plead, but when called upon to do so, he made rambling statements which made it difficult to determine with any certainty whether he intended to plead guilty or not guilty, and it was only after some little pressure from his counsel that he pleaded "guilty."

7. Mr. Coventry for the prosecution, however, suggested that in the peculiar circumstances of the case, a plea of "not guilty" should be entered, and the case tried out with the view of ascertaining what the prisoner's mental condition was at the time the offence was committed. Mr. Riley-Pearson, on the other hand, contended that the Court had no right to disregard the plea of

1915
17 *May.*

HENRY TAYLOR.

Reading L.C.J.
Avory J
Low J.

guilty, nor in face of the plea, to raise the question of insanity during the trial.

8. The Court were naturally reluctant to impose a term of imprisonment on Taylor, having regard to the sad circumstances of the case, without a full inquiry, and with considerable doubt acceded to Mr. Coventry's application, who was allowed on behalf of the prosecution to tender expert medical evidence as to the prisoner's state of mind on the day when the occurrence took place. The prisoner did not tender himself as a witness, nor was any evidence called on his behalf.

9. The medical evidence, as will be seen on perusal, was that the prisoner knew right from wrong, and knew the nature and quality of his act, but they were not agreed whether his mental disease was such as to render him incapable of controlling his actions.

10. I directed the jury that they could not find a verdict of guilty but insane unless they were of opinion that he was suffering from some uncontrollable impulse at the time the assault was committed. I stated also that I was doubtful whether such a finding was in accordance with law, but that my direction could, if necessary, be reviewed by the Court of Criminal Appeal. In directing the jury as I did, I had in my mind a passage from Sir Fitzjames Stephen's Digest of the Criminal Law, and the unreported case of *R.* v. *Duncan*, tried before the late Mr. Justice Lawrance at Cardiff, where, on a charge of murder, the prisoner was acquitted, but found insane on the question left to them being answered in the affirmative, "Was the prisoner unable to control his actions in consequence of a disordered mind?" (See case in Renton on Lunacy, at page 901.)

The jury found a verdict of guilty but insane, and the question on which I respectfully request the opinion of the Court is whether, on the above facts, this verdict could properly be returned.

(Signed) R. H. AMPHLETT,
Deputy-Chairman of Quarter Sessions.

Dickens, K.C. (with him *Hon. R. W. Coventry*) for the Crown. I have a preliminary objection to raise. An attempt was made to enter an appeal in the ordinary way in this case, but the registrar of the Court of Criminal Appeal refused to enter it on the

1915
17 *May.*

HENRY TAYLOR.

Reading L.C.J.
Avory J.
Low J.

authority of *Felstead*, [1914] A. C. 534; 83 L. J. K. B. 1132; 111 L. T. 218; 78 J. P. 313; 58 S. J. 534; 30 T. L. R. 469; 10 Cr. App. R. 129. It was then sought to get over the difficulty by getting the Deputy-Chairman of the Court of Quarter Sessions at which the appellant was tried to state a case under the Crown Cases Act, 1848 (11 & 12 Vict. c. 78). By sect. 1 of that Act, "When any person shall have been convicted of any treason, felony, or misdemeanour, before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge, or commissioner, or justice of the peace before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the Exchequer," now, by the Criminal Appeal Act, 1907, s. 20 (4), for the Court of Criminal Appeal. *Felstead* has decided that a prisoner who has been found by the jury to be "Guilty, but insane," has not been convicted; therefore the position is the same under an appeal on a case stated, and no appeal lies to this Court in this case. (He was stopped.)

W. H. Riley-Pearson for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was guilty on his own confession. When asked to plead he said, "I am guilty of striking a blow, but with no intention to do him serious harm." He was not charged with an offence in which intent was a necessary ingredient, and therefore that plea ought to have been accepted. It was never suggested that he was unfit to plead. His plea of guilty was never withdrawn. The indictment from which the record is made out shews that a plea of guilty was entered, and then a plea of not guilty directed by order of the Court. The Court had no power to alter his plea. 7 & 8 Geo. 4, c. 28, does not apply here, for it was never suggested that he refused to plead, or that there was any confusion in his plea. Rule 26 (d) of the Criminal Appeal Rules, 1908, does not apply; the rules did not contemplate an appeal on a plea of guilty, and so were not drawn up to meet such a case as this. Possibly the appellant's proper course is to apply in the King's Bench Division for a *mandamus* to the justices to have the proper verdict entered.

The LORD CHIEF JUSTICE: The Court is of opinion that the

c

1915
17 *May.*

HENRY TAYLOR.

Reading L.C.J.

preliminary point succeeds and that no appeal lies to this Court. The appellant pleaded guilty to the indictment on the advice of his counsel. The Crown took the view that a verdict of not guilty ought to be entered, and desired to have the view of the Court on the point. The Court, knowing that the appellant had come from a lunatic asylum, held that a plea of not guilty ought to be entered and the issue tried. We have the indictment and the case stated before us. The jury came to the conclusion at the end of the trial that the appellant had done the act with which he was charged, but was insane at the time. Consequently, the only order that the Court could make was that he should be detained during his Majesty's pleasure. The effect of that verdict is no longer in doubt; it was decided in *Felstead* that it amounts to an acquittal; that being so, the appellant cannot be "a person convicted on indictment," and a right of appeal is only granted under the Criminal Appeal Act to a person convicted on indictment. It was thought that the difficulty might be met by stating a case under the Crown Cases Act, 1848 (11 & 12 Vict. c. 73); the effect, however, is the same, because s. 1 of that statute begins, "When any person shall have been convicted of any treason, felony, or misdemeanour." According to the law laid down by the House of Lords in *Felstead* the appellant has not been convicted, and so he has no right to come to this Court either on a case stated or in the ordinary way of appeal. There are difficulties which arise in consequence of this view, difficulties which were probably not foreseen at the time of the passing of the Criminal Appeal Act. That is a matter for the legislature, which can introduce amendments if it thinks fit. We can only say that we have no jurisdiction to deal with the matter.

With regard to the argument put forward that once a plea of guilty is made it is not open to the Court to enter a plea of not guilty, it appears from the case stated that the trial proceeded, and that the jury found that the appellant was not guilty. We can only take note of the fact that he was acquitted. So no appeal lies to this Court.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE AVORY.

PHILIP BRENNER.

1915
7 *June.*

Severity of sentence mitigated (after reduction of term in case of the principal offender).

The appellant was convicted, before the Recorder, at the Central Criminal Court, on March 29th, 1915, of conspiracy to defraud and conspiracy to steal, and was sentenced to fifteen months' imprisonment with hard labour and fifteen months' imprisonment, the two sentences to be concurrent.

The appellant was tried with four other men—the sentence of one of whom was reduced on appeal to the Court of Criminal Appeal on April 26th, 1915 (see *Hyman Kurash*, above, p. 166)—for taking part in a conspiracy, known as a mock auction. The charge against him was that he had acted as auctioneer at this mock auction, and that, addressing the other prisoners as strangers, had asked them to "put" various sums of money on certain articles. This the other prisoners did, and the appellant thereupon handed them the articles and also returned them their money, saying that he did not want to take their money but that he only desired to advertise the business. Subsequently the other prisoners returned the articles which were pu back into stock. The appellant then asked the prosecutor to "put money on" similar articles, telling him that he would be "treated the same as the others." Relying on this assurance the prosecutor did as he was asked, but the appellant did not return to him any of the sums he parted with in this way. The jury found the appellant guilty on both counts in the indictment namely, of conspiring by means of false pretences to cheat and defraud the prosecutor of divers sums of money and with

1915
7 *June.*

PHILIP BRENNER.

Reading L.C.J.
Ridley J.
Avory J.

conspiring feloniously to steal divers moneys from the prosecutor, and sentence was passed as stated above.

The appellant, by leave of Mr. Justice Atkin, now appealed against the sentence.

The Appellant said that he was willing to enlist in the Army if the Court would quash his conviction.

Roland Oliver, for the Crown, drew attention to the reduction of the sentence in *Hyman Kurash*.

The LORD CHIEF JUSTICE: The appellant was convicted with four other prisoners of conspiracy to defraud and to steal, and was sentenced to fifteen months' imprisonment with hard labour on the first charge and to fifteen months' imprisonment without hard labour on the second charge. He made an application for leave to appeal against that sentence, and, leave having been granted, he now comes before this Court. On a recent occasion there was an appeal to this Court by one *Hyman Kurash*. He was tried at the same time as the appellant, and, in the opinion of the Recorder who tried the case, took a leading part in the conduct of the auction business where it was alleged that these frauds were committed. We also took that view, but, having regard to the fact that Kurash had never been previously convicted, ordered his sentences to be reduced. Similarly, in this case, the appellant has never been convicted before, and the Court is of opinion that the justice of the case will be met by reducing each term of fifteen months to nine months, the sentences, of course, to run concurrently.

Sentences reduced.

Solicitors for the Crown—*Wontner and Sons.*

G. F. L. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE SCRUTTON.

ALEXANDER RAPPOPORT.

1915
14 *June.*

Severity of sentence.

This was an appeal against sentence, by leave of Atkin J., and an application for leave to appeal against conviction. Appellant was convicted, on the 13th May, 1915, at the Central Criminal Court, before Mr. Commissioner Rentoul, of obtaining money and goods by false pretences, and was sentenced to eighteen months' imprisonment in the second division; he was also recommended for expulsion.

Appellant in person.

Huntly Jenkins for the Crown.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment which charged him with obtaining £10 by false pretences from one person, a diamond ring and a gold chatelaine from a second, and two watches from a third. The contest in the case depended on the view which the jury took of the evidence. According to the evidence of all the witnesses for the prosecution he had made the false pretences; according to his own evidence he had not made them, but he admitted that if he did make the statements they would have been lies. The jury convicted him, and we cannot see any ground for interfering with the conviction; they accepted, apparently without difficulty, the evidence for the prosecution, and this is not to be wondered at when the evidence is considered.

1915
14 *June.*

ALEXANDER RAPPOPORT.

Reading, L.C.J.

With regard to the sentence, the Commissioner sentenced the appellant to eighteen months' imprisonment in the second division, and also recommended him for deportation. If the sentence stood alone without the recommendation for deportation the Court would probably not intervene, but, bearing in mind that the appellant is only twenty-two years of age and has not been convicted before, we think that it may be reduced to twelve months' imprisonment in the second division, to be followed by the recommendation for deportation.

Sentence reduced.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE ROWLATT, MR. JUSTICE BAILHACHE, AND MR. JUSTICE LOW

M.

1915
21 *June.*

An indictment for an offence under 5 Geo. 5, c. 8, the Defence of the Realm Consolidation Act, 1914, is not bad because it avers that there was an intent to assist the enemy; such an averment is necessary so that the jury (rather than the Court) may find upon it.

If an intent to inform (and not to mislead) the enemy is proved, it is immaterial whether the "information" conveyed is correct or not.

This was an appeal against conviction on points of law and an application for leave to appeal against sentence and to call further evidence. Appellant was convicted, at the Central Criminal Court, on the 4th June, 1915, before the Lord Chief Justice, Avory and Lush JJ., of attempting to communicate information of a nature calculated to be directly or indirectly useful to the enemy with the intention of assisting the enemy; he was sentenced to death by shooting.

On the application of Sir Edward Carson, Att.-Gen., for the Crown, the Court directed that the appeal should be heard *in camera* (as it was below), under s. 1 (3) of the Defence of the Realm (Amendment) Act, 1915, 5 Geo. 5, c. 34.

Curtis Bennett (with him *Eustace Fulton*) for the appellant, who was present. The appellant was convicted on an indictment which was framed under regulations 18 and 48 of the Defence of the Realm (Consolidation) Regulations, 1914, which were issued on the 28th November, 1914, under the Defence of the Realm Consolidation Act, 1914, 5 Geo. 5, c. 8. The first count of the indictment charged him with having feloniously and without law-

1915
21 *June.*

M.

Darling J.
Lawrence J.
Rowlatt J.
Bailhache J.
Low J.

ful authority attempted on a date specified to communicate certain information with respect to the numbers, description and movement of the military forces of His Majesty, and with respect to the numbers and description of certain of the war materials of His Majesty, by means of a letter addressed to a person named [hereinafter in this report referred to as X——], the information being of a nature calculated to be directly useful to the enemy; the count contained a further allegation that the offence was committed by the appellant with the intention of assisting the enemy. The second count charged a similar offence, alleging that the information was of a nature calculated to be indirectly useful to the enemy. The other counts charged him with collecting and recording information calculated to be directly or indirectly useful to the enemy. Every count contained the allegation that the offence was committed by the appellant with the intention of assisting the enemy.

Regulation 18 is as follows: "No person shall without lawful authority collect, record, publish or communicate, or attempt to elicit, any information with respect to the movement, numbers, description, condition or disposition of any of the forces, ships, or war materials of His Majesty, or any of His Majesty's allies, or with respect to the plans or conduct, or supposed plans or conduct, of any naval or military operations by any such forces or ships, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defence of any place, or any other information intended to be communicated to the enemy or of such a nature as is calculated to be or might be directly or indirectly useful to the enemy, and if any person contravenes the provisions of this regulation, or without lawful authority or excuse has in his possession any document containing any such information as aforesaid, he shall be guilty of an offence against these regulations." Regulation 48 makes it an offence to attempt to commit any act prohibited by the regulations. Regulation 57 enacts that: "A person found guilty of an offence against these regulations by a court-martial shall be liable to be sentenced to penal servitude for life or any less punishment, or if the court finds that the offence was committed with the intention of assisting the enemy to suffer death or any less punishment, and the court may in addition to any other sentence imposed order that any goods in respect of which the offence has been committed be

1915
21 *June.*

M.

Darling J.
Lawrence J.
Rowlatt J.
Bailhache J.
Low J.

forfeited." By the Defence of the Realm (Amendment) Act, 1915, s. 1 (1), any offence under the regulations "triable by court-martial may be tried by a civil court with a jury, and when so tried the offence shall be deemed to be a felony punishable with the like punishment as might have been inflicted if the offence had been tried by court-martial."

[Counsel proceeded to refer to the evidence, and stated that the appellant admitted writing the letter referred to in the indictment, and that he had attempted to deceive the Censor; he maintained that he had written the letter quite innocently, without any idea that it might come within the regulations, and explained the circumstances in which he came to write it. Counsel then dealt with the application to call further evidence, and stated shortly what each witness was expected to prove.]

The indictment was bad because it included the words "with intent to assist the enemy." Regulation 18 creates a distinct offence which is made a felony; there is nothing about intent in that regulation, nor is there in regulation 48. In other regulations, such as 19 and 40, intent is made part of the offence. Regulation 57 is only punitive; it does not create any offence, but deals with the method and mode of trial, and the sentence which can be imposed. The latter part of that regulation which gives power to pass sentence of death only refers to regulations in which intent is made part of the offence. The Lord Chief Justice left it to the jury to say whether any offence had been committed both with and without intent. They found that it had been committed with intent. The indictment ought to have been quashed or else these words struck out.

Alternatively the judge was wrong in leaving the question to the jury; it was one for the Court to decide when fixing the punishment. The question of intent should not have been referred to in the indictment. I do not say that that would be the fairest way of treating such a prisoner, but it is the result of the way in which the regulations are drawn; no doubt they were drawn hurriedly.

At the conclusion of the case for the prosecution, I submitted that there was no evidence of intent to assist the enemy to go to the jury. The Court held that there was; I submit, wrongly.

At the close of the case for the defence evidence was called by the prosecution which was not in rebuttal, and which ought not

1915
21 *June.*

M.

Darling J.
Lawrence J.
Rowlatt J.
Bailhache J.
Low J.

to have been admitted. The appellant had been cross-examined on three letters (other than that charged) put in which he had written to X——; parts of these letters were in German, and a witness was called, at the close of the defence, to translate those parts. The appellant was improperly cross-examined on these letters.

The judge misdirected the jury by telling them that whether the information contained in the letter was true or false was wholly irrelevant; if the information was not true it could not assist the enemy, and therefore it would not be an offence to send it. The judge should have directed the jury that there was no evidence that the other letters on which the appellant was cross-examined contained information which was true. The omission to do so amounted to misdirection.

Sir Edward Carson, A.-G. (with him *Bodkin, Branson* and *Boyd*), for the Crown, was only called on with regard to the indictment and the cross-examination. The indictment set out all the elements necessary to constitute an offence under regulation 18; the suggestion that the appellant did so with intent to assist the enemy comes as an added presentment by the grand jury. It would have been highly improper for the prosecution not to have warned the appellant that they intended to rely on certain facts which would lead to a more severe sentence. The method adopted was the proper and the only method of giving that warning. Only one offence is alleged, but if that offence has been committed in an aggravated form a higher penalty can be imposed. The same course is always adopted in indictments under the Punishment of Incest Act, 1908 (8 Edw. 7, c. 45), s. 1 (1), which provides that a more severe sentence can be imposed if it is proved that the female person is under thirteen years of age. Under the second paragraph of regulation 57, the maximum sentence is less under certain regulations "if the offender proves that he acted without any intention of assisting the enemy," but the offence created in those regulations is not doing the act with such intent. The judge told the jury not to consider the question of intent until they had decided that an offence under regulation 18 had been committed.

I did not think it proper to open to the jury the other letters written by the appellant to X——, although I do not say I might not have done so. But when the defence that the whole trans-

1915
21 *June.*

M.

Darling J.
Lawrence J.
Rowlatt J.
Bailhache J.
Low J.

action was an innocent one was set up I was bound to cross-examine with regard to them. I merely asked defendant whether he wrote them, without making any reference to the contents. Once the letters were put in the court said that they had better be read, and as the portions in German might not have been intelligible to the jury without evidence of the English translation, that evidence was called, not by the Crown, but by direction of the court.

Darling J.: In this case the appellant was tried and convicted on an indictment which alleged that he did feloniously and without lawful authority on a certain date attempt to communicate certain information with respect to the numbers, description and movement of the military forces of His Majesty, and with respect to the numbers and description of certain of the war materials of His Majesty, by means of a letter addressed to X——, which is set out in the indictment, which said information was of a nature calculated to be directly useful to the enemy, contrary to the Defence of the Realm Act, 1914, and the Defence of the Realm (Consolidation) Regulations, 1914, and the jurors further presented that the offence was committed by the appellant with the intention of assisting the enemy. That is the first count of the indictment, and it alleges the offence created by regulation 18. The regulation provides that if a person does certain things he shall be guilty of an offence against the regulations, and regulation 48 makes it also an offence to attempt to commit such an act. That is followed by regulation 57, which provides that: "A person found guilty of an offence against these regulations by a court-martial shall be liable to be sentenced to penal servitude for life or any less punishment, or if the court finds that the offence was committed with the intention of assisting the enemy to suffer death or any less punishment." When these regulations were passed these offences were cognisable only by court-martial, but after that the Defence of the Realm (Amendment) Act, 1915, was passed, which enacted that: "Any offence against any regulations made under the Defence of the Realm Consolidation Act, 1914, which is triable by court-martial may, instead of being tried by a court-martial, be tried by a civil Court with a jury, and when so tried the offence shall be deemed to be a felony punishable with the like punishment as might have been inflicted if the offence had been

1915
21 June
M.
Darling J.

tried by court-martial." The appellant was tried by a court consisting of three judges sitting with a jury, and was found guilty.

The first point taken in the grounds of appeal is: "The indictment was bad because it contained the words 'with intent to assist the enemy,' which are not part of the offences created by regulations 18 and 48, Defence of the Realm (Consolidation) Regulations, 1914." We are of opinion that this contention is wrong. I have only read the first count because the point arises upon that. It is suggested that the question of intent ought to be alleged in a second count or not at all. We are of opinion that the count charges only one offence, and that the averment is necessary to justify the judgment for the offence when it is committed in an aggravated form. We think that this was of advantage to the appellant, as, if the contention is right he might have been tried for the offence without ever having had notice that the prosecution proposed to bring forward evidence to shew that he committed the offence with intent to assist the enemy, but when he had been convicted the judges alone might say that they were satisfied that he had committed the offence with such intent and sentence him to death. It has been contended that it was wrong to leave the question of intent to the jury. We are of opinion that it was properly left to them. To have tried him for one offence and to have left it to the jury to convict him of the lesser offence, and then, without warning, to have held him guilty of the greater offence would have been contrary to all the principles of justice. We cannot believe that the legislature can have contemplated such a possibility. Unless this charge had been put in the count it would not have been left to the jury. On this ground of appeal the Court desires to say that if there had been no evidence of intent the jury ought to have been limited by the court to finding the offence only in its lesser, and not in its more aggravated form.

The next ground of appeal is, "That the learned judge was wrong in leaving to the jury the question of whether there was an intention to assist the enemy," since under regulation 57 that question is for the court. We are of opinion that it was a question of fact (that is indisputable), and that it was a proper question to be left to the jury. When the Act of Parliament gave a civil court power to try these offences it never intended to split up the questions of fact, leaving some to the jury and some to the

1915
21 *June.*

M.

Darling J.

court. Although the appellant was tried by three judges that was not necessary, so if the contention is right he might have been tried by the jury on the one issue, and then one judge might have said that he was satisfied that he had acted with intent to assist the enemy. When the regulations were issued these offences were to be tried by court-martial, and then several Officers would have had to find the facts as well as the law, and several Officers would have had to concur before a prisoner could have been found to have acted with intent, but if what is contended for is right, that could be done by one man which is the act of several men at a court-martial. In this case, even if we decided otherwise, it would not assist the appellant because the Court expressed an opinion in the same terms as the jury.

The third ground of appeal is, "At the conclusion of the case for the prosecution it was submitted on my behalf that there was no evidence of any intent to assist the enemy to be left to the jury, and the learned judge should have so held." Upon that question the Court is of opinion that there was ample evidence at the close of the case for the prosecution to be left to the jury that the appellant acted with the intention of assisting the enemy. (His Lordship referred to the evidence in question.)

The fourth ground is, "That at the close of both the case for the prosecution and for the defence, further evidence was called which was not evidence by way of rebuttal, and was improperly admitted." In the opinion of the Court nothing was admitted in evidence except the translation of letters in German which had already been put in, and this was done, not at the request of the Crown, but by the order of the court. The appellant was tried by an English jury, and there was no evidence that any of them understood German. The court could not tell the extent of the jury's proficiency in German. The jury might have thought that the letters were ten times worse than they were. The court had to see that in any opinion they formed on the letters the jury had the right information as to what the letters contained. We are further of opinion that these three letters were admissible in chief if they had been put in; certainly after cross-examination had indicated the nature of the defence that was set up. It is not necessary that we should hold so, but this strengthens the argument that they were admissible in cross-examination.

The next ground of appeal is, "That the learned judge mis-

1915
21 *June.*
M.
Darling J.

directed the jury." That is founded mainly on the following passage from the summing up: "Whether the information was true or not which he was sending is, in my opinion, wholly irrelevant. If he was sending information which from its very nature he must have known would be of use, or might be of use, to the enemy, then that he sent wrong information would not be an answer to the charge. In this particular case we have evidence that at least some of the statements made in the letter were true." We think that that was quite justifiable, but perhaps the matter was more plainly put by the Attorney-General before the summing up. He said: "If he intentionally communicates information he takes the risk whether it is true or not." We think that is right if it is read: "If he intended to inform and not to mislead he takes the risk whether it is true or not." To hold otherwise would be to put upon the prosecution an impossible task. To find out if the information did assist the enemy one must know all the information the enemy had got from other quarters. The prisoner might say that the enemy already had the information, or had already taken the position with regard to which the information was sent, or that the enemy's leaders were not capable of benefiting by the information. If the intention is to assist the enemy the offence is committed.

There is an application for leave to call further evidence. Counsel has indicated what he expects that to prove. The evidence seems of hardly any value, and if given at the trial it would not have influenced the jury in the slightest degree.

As to sentence, it is sufficient to say that no reason has been shewn to the Court why the sentence should not be carried out.

Appeal dismissed.

Solicitor for the Appellant—*F. Freke Palmer.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE SHEARMAN.

ALFRED LAURENS ALIAS ARTHUR LAWSON.

1915
28 *June.*

The promotion of a limited liability company is a "purpose" within s. 1 (1) (*a*) *of* 1 *Edw.* 7, *c.* 10, *the Larceny Act*, 1901.

Appeal against conviction and sentence.

The appellant was convicted on the 18th May, 1915, before Mr. Commissioner Rentoul, at the Central Criminal Court, of fraudulent conversion of certain money, and was sentenced to three years' penal servitude.

C. E. Jones for the appellant. The appellant was convicted under s. 1 (1) (a) of the Larceny Act, 1901, having been also indicted under s. 1 (1) (b). He inserted an advertisement in various newspapers to the effect that a secretary was required for a company about to be formed to exploit a patent. An investment would be required from the person appointed to the post, and shares would be allotted to him. A gentleman named Oppé, and also other persons, answered this advertisement, and after negotiations gave the appellant money in accordance with the proposals contained therein. It was subsequently found that the appellant had not applied the whole of the money received by him for the purposes of the formation and promotion of the company, but had converted a considerable portion to his own use, and that in fact the patent for the exploitation of which the company was to be formed did not stand in his name. Proceedings were in consequence instituted against the appellant, with the result that he was tried and convicted. It is submitted on these facts that the money was not received by the appellant "for or on account of any other person." The company in which the money was to

1915
28 *June.*

ALFRED LAURENS ALIAS ARTHUR LAWSON.

Reading L.C.J. Avory J. Shearman J.

be invested had not been formed. It is possible that he may have been entrusted with it, but the two things are not the same. The learned judge was wrong in directing the jury that they were. In *Grubb*, 11 Cr. App. R. 153 (1915), the Court did not accept the argument offered on behalf of the Crown that there was no distinction between the two offences. Moreover, the judge should have directed the jury that a reasonable time must be allowed after the receipt of the money for the formation of the company, and that it was for them to decide whether that reasonable time had been exceeded by the appellant.

Roome for the Crown. Upon the facts the defendant clearly was entrusted with the money for the purposes specified in the indictment upon which he was charged, and also received it "for" and "on account of" the proposed company. Although not so specified in the written agreements, there was parol evidence upon which the jury could find that it was incumbent upon the appellant to form the company as soon as possible and to use for that purpose all the money received by him from the persons who answered his advertisement. In fact, he used part of the money for his own purposes, and relied for the fulfilment of his obligations on any money of which he might subsequently become possessed. [He was stopped.]

C. E. Jones replied.

The LORD CHIEF JUSTICE: The question for our consideration in this case is whether or not there was evidence upon which the jury could convict the appellant of converting to his own use money entrusted to him for a particular purpose within the meaning of s. 1 (1) (a) of the Larceny Act, 1901. It is immaterial whether he could have been convicted under sub-s. 1 (b), because that in our view would really only amount to a different way of stating the same offence. I desire to make it quite clear that I am not attempting to state any new proposition of law with regard to the meaning of "received" in sub-s. 1 (b). In our judgment it is clear that on a mere contract of sale and purchase of shares and the payment of money by the purchaser to the vendor, followed by failure on the part of the vendor to deliver the shares, there could not be, on those facts simply, an entrusting

1915
28 *June.*

ALFRED LAURENS ALIAS ARTHUR LAWSON.

Reading L.C.J.

of the money to the vendor within the meaning of the sub-section. If this conviction had rested upon evidence of that character it is beyond doubt that it could not have stood. But here there were no shares in existence at the time of the agreement between the parties. There was no company in existence. The money was paid to the appellant for the purpose of assisting to form the company, in order to exploit the patent which belonged to a gentleman who was under agreement to assign it to him in certain circumstances. That assignment never took place. The appellant undertook to allot shares in the company when formed to the persons who had paid him the money. It is obvious that it was open to the jury to find that the money was paid in order to assist the promotion of the company which, when promoted, would enable the payers of the money to obtain shares in the company and the employment promised to them under the agreement. If those were the facts found by the jury, the money was in our opinion entrusted to the appellant for "the purpose" of "applying" it, or a part of it, in a particular way. If the appellant received this money, and was under contractual obligation to use it or part of it for the formation and promotion of the company, then the money was entrusted to him for that "purpose"; and if he failed to apply it to that purpose the jury were right in convicting him. In our judgment there was ample evidence of fraudulent conversion of this money by the appellant, and the jury were right in coming to the conclusion to which they did—an adverse one to the appellant.

It was also argued that the learned judge misdirected the jury. This Court cannot agree with that contention. It seems to us that the learned judge put the case quite fairly to the jury. In these circumstances we have come to the conclusion that this conviction must stand, and that this appeal must be dismissed. When we bear in mind the record of the appellant, we also find it impossible to interfere with the sentence of three years' penal servitude passed upon him.

Appeal dismissed.

Solicitor for the appellant—*J. K. Torkington.*

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE AVORY.

1915
12 *July.*

WILLIAM GEORGE SIMPSON.

Murder.

The doctrine of provocation in homicide only applies to provocation by the deceased.

This was an application for leave to appeal against conviction. Appellant was convicted on the 30th June, 1915, at the Newcastle-upon-Tyne Assizes, before Rowlatt J., of murder, and was sentenced to death.

Paley Scott for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of the murder of his son. He was a soldier, and returning home on leave, found his home in a very bad condition. His wife, who had been well supplied with money in his absence, had spent it in drink, and on the 3rd May admitted to him that she had brought soldiers home to sleep there in his absence. The deceased, whose age was two years, was suffering from water on the brain, and according to the medical evidence was likely to die at any time from one of the fits to which he was subject; the malady was a very painful one to witness. On the 4th May the appellant had some drink, but was not seriously drunk. He went home at mid-day and found the child in bed suffering visibly. He sent his daughter, aged seven, to fetch his wife, but she did not return, and later he sent another girl, who came to the house with a message, on the same errand, but the wife still did not return. He sat watching the child and brooding, and suddenly seems to have formed the intention of killing the child. He drew a razor, which he had brought home with him, from his pocket and cut the child's throat. The appellant gave evidence at the trial in

1915
12 *July*.

WILLIAM GEORGE SIMPSON.

Reading L.C.J.
Bray J.
Avory J.

which he admitted having killed the child, and said, "The reason why I done it was I could not see it suffer any more than what it really had done. She was not looking after the child, and it was lying there from morning to night and no one to look after it, and I could not see it suffer any longer and have to go away and leave it."

My submission was that it was open to the jury on the evidence to return a verdict of manslaughter, and it is probable that they would have done so had not the judge directed them that they could not do so, there having been no provocation from the victim; he said, "It is my sad duty to tell you that if he injured the child even with the best and kindest motive, you must find murder." My ground of appeal is that that direction was wrong in law; the provocation caused by the wife's confession of adultery, followed by his distress of mind at seeing the child's suffering and his wife's neglect of it, were sufficient to justify such a verdict. Discovery of the wife's adultery is sufficient to reduce the homicide of the wife to manslaughter, *Rothwell*, 12 Cox, C. C. 145 (1871); there no doubt the provocation came from the victim, and I cannot find any case where it was held that provocation from one person was sufficient to reduce the killing of another person to manslaughter, but there is no reason in law why such provocation should not be held sufficient.

Waugh, *K.C.*, and *Rowan-Hamilton*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: This is a very painful and lamentable case. The appellant returned home from the front on leave, and found his home in a deplorable condition. His children had been neglected and his wife had been unfaithful to him, a fact which was not disputed by her. She had thirty shillings a week separation money and five shillings from a fund administered by the Lord Mayor of Newcastle, so she had ample means with which to keep the home decent. Their child, two years old, was suffering from what is popularly known as water on the brain, which caused great distress and pain. The appellant went to his mother-in-law's, where he had some drink, but not enough to make him drunk; he returned home and, finding the child in agonies, sent a daughter to fetch his wife; later he

1915
12 *July.*

WILLIAM GEORGE SIMPSON.

Reading L.C.J.

sent another child, but the wife did not return. Sitting there brooding over his wrongs, he formed the intention of killing the child; in his own words, "The reason why I done it was I could not see it suffer any more than what it really had done. She was not looking after the child, and it was lying there from morning to night and no one to look after it, and I could not see it suffer any longer and have to go away and leave it." He had a razor in his pocket which he had brought home with him in the ordinary course of things, and he took it out and cut the child's throat with it, causing almost immediate death. He was charged with the murder, and was defended at his trial by Mr. Paley Scott. From a careful examination of the evidence and arguments it is clear that he said everything that could be said to reduce the crime to manslaughter if such a verdict was admissible in law. The judge pointed out that there must be some ground, based on some evidence, put forward before he could leave to the jury the question of reducing the crime to manslaughter, and he, though not wanting in sympathy towards the appellant, felt bound to direct the jury that they must find murder.

No authority has been cited to support the proposition that provocation by one person, followed by the homicide by the person provoked of another person, is sufficient to reduce such homicide to manslaughter. There is no such authority. There are many authorities on the provocation that may reduce the crime to manslaughter, but those cases differ from the present. In law the defence set up that this might be manslaughter and not murder is inadmissible. The direction given in law is in our opinion unexceptionable. There was a definite intention to kill, and the fact that the appellant was angry with good reason with his wife was no justification for a verdict of manslaughter. In our opinion the direction was right, and in law the facts admitted by the man himself constituted murder.

The jury made the strongest recommendation to mercy, and nothing that we have said is intended to detract in the slightest degree from that recommendation. That is a question for the clemency of the Crown, and we can only dismiss the application.

Application dismissed.

A. L. B. T.

JOHN HUNTER HALL.

1915
12 *July*.

Reading
L.C.J.
Bray J.
Avory J.

Where the trial judge has suggested to the jury the possibility of a criminal conspiracy between the defendant and a person not called as a witness, the Court may exceptionally allow that person to be called on the appeal, and, if his evidence is satisfactory, will, if it believes that the jury might have been influenced by such evidence, quash the conviction.

This was an appeal against conviction, by leave of Atkin J. Appellant was convicted at the Winchester Assizes on the 14th June, 1915, before Lord Coleridge J., of fraudulent conversion, and was sentenced to eight weeks' imprisonment in the second division.

Charles Zeffertt for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of the fraudulent conversion of £40, with which he had been entrusted by a Mr. or Mrs. Adams, in order that he might retain it in safe custody. Mr. Adams in May, 1914, desired to buy some land in Hampshire, which was for sale for £450, but which he considered of much greater value; he also wished to borrow the whole of the purchase-money on mortgage. As the result of an advertisement he got into touch with the appellant, who was a mortgage broker in Newcastle-on-Tyne, and a contract was entered into between the appellant and Mrs. Adams, Adams being an undischarged bankrupt, by which the appellant was authorised to raise the loan, for which he was to be paid $1\frac{1}{2}$ per cent. commission, "upon the completion of the negotiations." He got into touch with a Mr. Ward, a solicitor of Newcastle, and informed Adams that Ward had clients who were prepared to take the matter up on terms that Adams was to contribute £100, or some smaller sum, which was to be spent in improving the property, and which would be repaid him in the form of a further advance when the improvements had been carried out. It was also suggested that Ward should act as Adams's solicitor in the transaction. Adams agreed to advance £40 on these terms, and received letters from Ward in connection with the matter, but these letters were not put in evidence at the trial. On the 14th September Adams sent the appellant a cheque for £40; the cheque was drawn by Mrs. Lucas, Adams's mother-in-law, and was used by the appellant to

1915
12 *July.*

JOHN HUNTER HALL.

Reading L.C.J.
Bray J.
Avory J.

open a new banking account; after that date the appellant saw the vendor's solicitor, and got the purchase price reduced from £450 to £400. On the 28th December the appellant wrote to Adams complaining that Bigg, the vendor's solicitor, had asserted that the appellant had received a deposit from Adams, and he pointed out that the £40 paid was not on account of the purchase money, but was a contribution towards the mortgage money, and promised to account for it in due course. There were further complaints at the delay in letters from Bigg and Adams to the appellant, and the appellant wrote that he had brought the lawyers together and that the matter now rested with them. On the 29th January, 1915, Mr. Bolton, a solicitor, wrote on behalf of Adams, demanding the return of the £40, and on the 5th February the appellant answered that he received the £40 from Mrs. Lucas, and not from Mr. or Mrs. Adams, and that in any case he had a lien on the amount for his commission, his charges in getting a reduction in the purchase price, and for other services; further, that probably Ward would expect him to protect him as regards his costs, and that therefore he could not part with the balance until Ward released him from this obligation. That was substantially the defence put forward at the trial. On the following day a warrant for the appellant's arrest was applied for. At the trial the appellant's account with the bank into which he had paid the £40, was produced; it showed that £5 was drawn out on the same day, and that, while further sums were paid in, the balance was always less than £40.

The ground of appeal is that the judge misdirected the jury. The test offered by the judge to the jury was: Did Ward have a client? This is the wrong test. The right test is: Did the prisoner believe Ward had a client? If it was the right test, it being for the prosecution to prove fraud, the *onus* of proving that Ward had no client was on the prosecution. Ward was not called by the prosecution, and the judge told the jury that the prosecution did not believe in Ward or his client, and that it was the duty of the defence to call him or the proposed lender. I submit that this was putting on the appellant the *onus* of proving his innocence, whereas it was for the prosecution to prove fraud. There was no evidence that Ward did not have a client: all the evidence both for the prosecution and defence was to the contrary. The judge said: "If you think it was merely

1915
12 *July*.
JOHN HUNTER HALL.
Reading L.C.J.
Bray J.
Avory J.

bad judgment, that he took a wrong view of his rights, of course no criminal charge ought to attach. But if, on the other hand, you think this was a conspiracy between this man and Ward to produce an imaginary client, who has never been heard of in fact, and so by a trick to get money out of Mr. Adams, and then keep it under a pretence, then it is clear that the terms upon which the money was received, and afterwards dealt with, were fraudulent." Even if the test was the right one, even if there was sufficient evidence that Ward had no client, there was no evidence of any such conspiracy. These are the serious misdirections complained of on behalf of the appellant; there are many others with which in my submission it is unnecessary to deal. On these grounds the Court should quash the conviction, but if the Court is against me on these points, I desire to apply to call further evidence.

S. H. Emanuel for the Crown. There was ample evidence on which the jury could convict the appellant of fraudulent conversion.

[The LORD CHIEF JUSTICE: If the case had been left to the jury to say whether he converted fraudulently or not there would have been evidence to support a conviction. But the serious matter is that the judge left it to the jury as a conspiracy between the appellant and Ward.]

On the evidence the jury might have found that the appellant knew that no arrangement had been made for a mortgage.

The Court asked whether counsel for the appellant desired to call Ward and Bigg to give evidence, and stated that he must decide whether he wished to do so before the Court gave judgment on the main question. Counsel stated that he did wish to call that evidence, and leave was accordingly given and the case adjourned; the appellant was released on his own recognisance.

19 *July*.

Septimus Gladstone Ward, called and examined by *Zeffertt*. I am a solicitor in Newcastle-on-Tyne, and have been in practice over twenty-eight years. I wrote to Adams and produce a letter from him dated 10th September, 1914, instructing me to act for him and his wife. I had clients, trustees, who were prepared to

1915
19 *July.*

JOHN HUNTER HALL.

Reading L.C.J.
Bray J.
Avory J.

advance them the £450, provided there was a proper margin; I can give their names if required. I produce a copy of the draft contract which I received from the appellant for the purpose of completing the mortgage. I had further correspondence with Adams.

By the Court: I was subpœnaed to attend at Winchester Assizes; I sent, before that, a statement to the solicitor for the prosecution.

Cross-examined by *Emanuel:* I told the appellant that I could not advise a loan of £450, even if the property was valued at £750, in face of the purchase price of £400. I suggested spending money on the property and having a valuation after the improvements were effected. It was not intended to have it valued by my clients until that had been done. I think the appellant did tell me that he had £40 in earnest of repairs; there was no arrangement with me for such a deposit, nor did I stipulate for it. I did write to Mr. Bolton on the 4th February, 1915, that I had a feeling that the appellant was probably leading Mr. Adams to suppose something rather different to what I had said with regard to the question of mortgage.

William Edward Bigg, solicitor, Salisbury, called and examined by *Zeffertt.* I saw the appellant at Salisbury, after which the purchase price was reduced from £450 to £400. I had a good deal of correspondence with him.

Emanuel: Even if the judge misdirected the jury, there has been no substantial miscarriage of justice. The appellant represented to Adams that Ward had stipulated that £40 should be deposited, which was untrue. He obtained the £40 on the statement that he would bank it and hold it to the order of Adams. When asked to return the £40, he set up that he had earned his commission, which he must have known was untrue; in any case the commission would only have amounted to £6 15*s.* He further said that he had received the cheque from Mrs. Lucas, and so was not responsible to Adams; or that alone the jury could have found that he was fraudulent.

1915
19 *July.*

JOHN HUNTER HALL.

Reading L.C.J.
Bray J.
Avory J

Zeffertt: The appellant has not had a fair trial, first, because the judge misdirected the jury, and secondly, because two important letters were in the hands of the prosecution, and were not produced in court. One of them shews that a mortgage was being arranged; both letters and the statement obtained by the prosecution shew that when the judge was directing the jury that conspiracy was the case for the prosecution and that the prosecution said there was no client, the prosecution had in their possession evidence that there was no conspiracy and evidence that there was a client. It cannot be said that the jury would have convicted on a proper direction, which is now the proper test. *Stoddart*, 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612; 2 Cr. App. R. 215 (1909). That decision overrules *Cohen and Bateman*, 73 J. P. 352; 2 Cr. App. R. 197 (1909), where the expression used was "must have convicted," which appeal was heard after *Stoddart*, but judgment in the latter case was reserved and given at a later date. No one can say in this case what decision the jury would have come to if properly directed. In dealing with questions of the state of a man's mind, it is very important that the jury should be directed rightly that the *onus* of shewing he had a guilty mind lies on the prosecution. If rightly directed could the Court say that the jury would have come to the conclusion that the prosecution had fulfilled beyond reasonable doubt their duty of proving the prisoner had a guilty mind? The defence was that the appellant thought he was entitled to keep the money, and that would have been sufficient even if he had been mistaken in that view, but the jury were never directed on the point. Although the banking account shewed a balance of less than £40, other amounts were being paid in by the appellant; the jury might on this one fact have come to a different conclusion if rightly directed.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment which charged him under the Larceny Act, 1901, with the fraudulent conversion of a sum of £40 which had been entrusted to him for safe custody. The case comes before us as an appeal from the conviction. On the last occasion our attention was directed to a passage in the summing up, in which the judge told the jury in almost the last words of his direction to them, "If, on the other hand, you think this was a conspiracy

1915
19 *July.*

JOHN HUNTER HALL:

Reading L.C.J.

between this man" (that is the appellant) "and Ward to produce an imaginary client, who has never been heard of in fact, and so by a trick to get money out of Mr. Adams, and then keep it under a pretence, then it is clear that the terms upon which the money was received, and afterwards dealt with, were fraudulent." That has formed the basis of an argument addressed to us by counsel with great force and ability, and his contention is that there was no evidence on which the judge was justified in giving such a direction, that there was no evidence of conspiracy, and no conspiracy in fact. He has also asked us to hear the evidence of Ward and Bigg. Ward is the solicitor who acted for Adams, the gentleman who entrusted the £40 to the appellant. He was acting for Adams, the intending purchaser and intending mortgagor. The appellant, as the result of an advertisement, had got into touch with Adams, and had been authorised by him to negotiate the mortgage on the property Adams wished to purchase.

The difficulty in the case arises entirely from the summing up. This Court was of opinion before it heard the further evidence that on the evidence given at the trial, and which was not in controversy, it would have been open to the jury to find the appellant guilty of fraudulent conversion. He obtained the £40 on the statement that he would bank it and hold it to the order of Adams. As soon as he received it he opened a banking account and proceeded to draw on it. It is true that he paid in certain sums, but he continued to operate on the account, and at all material times the account was not in a position to pay out £40. The balance finally, when the appellant was arrested, was £19. That £40 was the money which he had undertaken to hold in safe custody, and the only question is whether the evidence sufficiently established fraudulent conversion.

To deal first with the misdirection, it is right to point out that in our view on the facts as they presented themselves to the mind of the judge, he was undoubtedly of the opinion that reflection was cast upon Ward, and a good deal of discussion arose whose duty it was to call Ward. The judge referred to the matter in his summing up, and said it was the duty of the defence. It is clear that there is not the faintest ground for suggesting that Ward is anything but a reputable solicitor. We are told by counsel for the prosecution that there was no intention to suggest that Ward was not reputable, but unfortunately the judge did

1915
19 *July*.

JOHN HUNTER HALL.

Reading L.C.J.

get that impression, probably from the fact that Ward was not called as a witness by the prosecution. It is very unfortunate that the judge was allowed to believe that such a suggestion was made in a way that led him to make the observations under discussion. In the result we are all of the opinion that the direction was wrong. We have had the advantage of hearing further evidence in this case, because it is an exceptional case, and we have departed from our usual practice in order to ascertain the true facts. The appellant has made out that there was misdirection; but we have to find out whether there has been a substantial miscarriage of justice, to use the words of s. 4 (1) of the Criminal Appeal Act. It was said in *Christie*, 30 T. L. R. 41; 9 Cr. App. R. 169 (1913), "It has been argued that the admission of the evidence was not a substantial matter, and that there has been no miscarriage of justice. The test must be whether the jury would have come to the same conclusion if the evidence had been properly excluded. We are unable to say that they would have come to the same conclusion, and it is insufficient to say that they might have done so. Therefore, the conviction must be quashed." That was not put as a new proposition of law; it had been laid down many times. Applying that test, the conclusion of the Court is that, though there were strong facts to support the case for the prosecution, we are not satisfied that the jury would have come to the same conclusion if properly directed. Undoubtedly they might have done so, but that is not sufficient. Bearing in mind that the amounts drawn out were small, and that a considerable sum was left in at the end, and that the jury might have thought that, although he was wrongly drawing on the account, he had no intention of fraudulently converting the money, our opinion is that the conviction must be quashed.

Conviction quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE LUSH.

GEORGE JOSEPH SMITH.

1915
29 *July.*

Murder.

It is a general rule of law that when there is primâ facie *evidence that a defendant is guilty of the act charged, evidence of "similar acts" is admissible to shew that those acts were done with intent. But the judge must carefully direct the jury on the limits of the use which they may make of the latter evidence.*

On a trial for murder the evidence admissible of such similar cases is not necessarily confined to the fact of death, but may include surrounding circumstances; the criterion of extent is (semble) *the necessity of assisting the jury.*

It is undesirable that the judge should suggest in his charge to the jury a theory of the mode of death not previously put forward at such trial.

This was an appeal against conviction on points of law. Appellant was convicted on the 1st July, 1915, at the Central Criminal Court, before Scrutton J., of murder, and was sentenced to death.

Marshall Hall, K.C. (with him ***Montague Shearman*** and ***H. Grattan-Bushe***) for the appellant, who was present. The appellant was charged with the murder of Bessie Munday, a woman with whom he had gone through a form of marriage, his wife being alive. She was found dead in her bath at Herne Bay on the 12th July, 1912, and at the trial evidence was given of the deaths of Alice Burnham and Margaret Elizabeth Lofty on dates subsequent to the death of Bessie Munday; evidence was given that the appellant had gone through a form of marriage with each of these women, and that they both died in their baths in circumstances very similar to those surrounding the death of Munday. This evidence was inadmissible because, apart from this evidence, no *primâ facie* case was

1915
29 *July.*

GEORGE JOSEPH SMITH.

Reading L.C.J.
Darling J.
Lush J.

made out against the appellant. *Makin* v. *Attorney-General of New South Wales*, [1894] A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148. Scrutton J. held that that case was binding upon him because it had been affirmed by the House of Lords in *Ball*, [1911] A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 27 T. L. R. 162; 6 Cr. App. R. 31. The principle laid down in *Makin's* case is that some physical act must first be proved against the prisoner before evidence can be given of other matters in order to prove the nature of the prisoner's act. In *Boyle and Merchant*, [1914] 3 K. B. 339; 83 L. J. K. B. 1801; 111 L. T. 638; 78 J. P. 390; 58 S. J. 673; 30 T. L. R. 521; 10 Cr. App. R. 180, Lord Reading C.J. said, "We think that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged." The same principle was followed recently in *Perkins* v. *Jeffery*, [1915] 2 K. B. 702; 31 T. L. R. 444, in which Avory J. said, "Having regard to what was said in the House of Lords in the case of *Christie*, [1914] A. C. 545; 83 L. J. K. B. 1097; 111 L. T. 220; 78 J. P. 321; 58 S. J. 515; 30 T. L. R. 471; 10 Cr. App. R. 141, as to the practice in a criminal case of guarding against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury out of proportion to its true evidential value, we think that such evidence as to other occasions should not be admitted unless and until the defence of accident or mistake, or absence of intention to insult, is definitely put forward."

[The LORD CHIEF JUSTICE: In *Christie* the House of Lords decided that the evidence was admissible, but stated that a practice had grown up for the judge to say that the evidence, though admissible in law, ought not to be received because its value was so small as compared with the prejudice created.]

If the evidence regarding the death of Munday had been given first, and the prisoner had given evidence suggesting that her death was accidental, then the other evidence would have been

1915
29 *July*.

GEORGE JOSEPH SMITH.

Reading L.C.J. Darling J. Lush J.

admissible; the test is whether there is sufficient evidence of the crime for which the prisoner is being tried for the judge to leave to the jury. *Baird*, 11 Cr. App. R. 186 (1915). The strongest case against me is *Gray*, 4 F. & F. 1102 (1866), but it must have been wrongly decided; it is impossible to see on what principle the evidence was admitted there.

[DARLING J.: *Gray* is cited with approval by Lord Herschell C. in *Makin's* case.]

[The LORD CHIEF JUSTICE: Do you object to this as the test? Is there, as a matter of law, *primâ facie* evidence that the prisoner has committed the act charged against him? Sometimes, although there is evidence in law, the judge thinks it unsafe to leave the case to the jury.]

I accept that test, which was that adopted by Innes J. in *Makin's* case, 14 N. S. W. Rep. 1 (1893), citing *Hall*, 5 N. Z. L. R. 93. Even assuming that such *primâ facie* evidence was given, the Crown insisted on its right to open the facts before any evidence was given at all.

Even assuming that *primâ facie* evidence was given, this was not a case in which evidence of other matters was admissible; there was no necessity for the prisoner to prove anything; the burden was on the prosecution to prove the intent. If there had been no cross-examination, and the prisoner did not give evidence or address the jury, the evidence could not be given.

[DARLING J.: Lord Herschell C. says in *Makin's* case, "On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."]

That must mean open and adopted.

[DARLING J.: One may be able to say on the facts that it is

1915
29 *July*.

GEORGE JOSEPH SMITH.

Reading L.C.J.
Darling J.
Lush J.

clear what the defence will be; that is "a defence which would otherwise be open to the accused."]

The evidence would be admissible only if the defence is set up by cross-examination or direct evidence. I admit that at the discretion of the judge, evidence can be called by the Crown in rebuttal although it was available in chief, see *Crippen*, [1911] 1 K. B. 149; 80 L. J. K. B. 290; 103 L. T. 705; 75 J. P. 141; 22 Cox C. C. 289; 27 T. L. R. 69; 5 Cr. App. R. 255, but I say that the evidence was not admissible in chief. The judge admitted it as evidence of a system of murdering women, with whom the appellant had gone through a form of marriage, for the sake of their money. *Francis*, L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 30 L. T. 503; 22 W. R. 663; 12 Cox C. C. 612 (1874), is the nearest case dealing with system. It should not be assumed that there was any *primâ facie* case here; there was strong evidence of motive, and some of opportunity, but none of any physical fact. At the inquest the doctor gave evidence that in his opinion the woman had had an epileptic seizure. The prosecution chose to proceed on the first death in order of time; how can evidence of murders at much later dates be evidence of the appellant's intention then?

[The LORD CHIEF JUSTICE: It is frequently done to prove malice in cases of libel, and we held evidence of subsequent acts admissible to prove motive in *Mason*, 10 Cr. App. R. 169; 111 L. T. 336; 78 J. P. 389 (1914).]

[LUSH J.: In *Geering*, 18 L. J. M. C. 215 (1849), there was no direct evidence that the accused woman had administered arsenic; the other evidence was given there to prove that fact. So it was here; it was not a question of intention.]

Secondly, even if evidence was admissible that the three women died in their baths while the appellant was in the house, the matter was carried very much further here, and evidence of all the surrounding circumstances in each case was given. The only effect was to prejudice him very gravely, and that evidence ought to have been excluded by the judge.

The judge misdirected the jury as to the purpose with which

1915
29 *July*.

GEORGE JOSEPH SMITH.

Reading L.C.J.
Darling J.
Lush J.

the evidence was admitted; he said, "I have told you how you ought to consider that case. You have to consider, have the prosecution satisfied you that Bessie Munday was killed by the prisoner? Bessie Munday dies under a series of circumstances which the defence say are quite consistent with an accidental death. The prosecution say you find that series of circumstances repeated in the death of Alice Burnham, and when you get two repetitions of the same set of circumstances—and I shall have to call your attention at the close of my summing up to the coincidences—you are entitled to find that an occurrence of this sort which benefits the prisoner, with these attendant circumstances, is design and not accident," and "The jury have to take into account three things, the circumstances of the dead body, and the way in which it is found, and the evidence they have as to the way it died; the opportunity of the prisoner to cause the death or not; the motive of the prisoner for causing the death. It may be that even then they are not sure whether it is accident or design. And then comes in the purpose, and the only purpose, for which you are allowed to consider the evidence as to the other deaths. If you find an accident which benefits a person and you find that the person has been sufficiently fortunate to have that accident happen to him a number of times, benefiting him each time, you draw a very strong, frequently an irresistible inference, that the occurrence of so many accidents benefiting him is such a coincidence that it cannot have happened unless it was design."

[The LORD CHIEF JUSTICE: I think that puts it very accurately, and states exactly the reason why the evidence is admissible.]

The judge has in other passages gone very near to the dangers indicated by Lord Herschell, of allowing the jury to think that the evidence shewed that the appellant was the sort of man who was likely to commit such a crime.

Evidence of a solicitor and his clerk was admitted improperly to the effect that the appellant had consulted the solicitor as to the legal effect of a voluntary settlement made by Munday, and whether the trustees could sink the whole of the corpus in buying an annuity without her consent; also as to the effect of mutual wills, and whether the trustees could still purchase an annuity after such wills were made. The evidence was objected to, but

1915
29 *July*.

GEORGE JOSEPH SMITH.

Reading L.C.J. Darling J. Lush J.

admitted by the judge on the authority of *Bullivant* v. *Attorney-General for Victoria*, [1901] A. C. 196; 70 L. J. K. B. 645; 84 L. T. 737; 50 W. R. 1; and *Cox and Railton*, 14 Q. B. D. 153; 54 L. J. M. C. 41; 52 L. T. 25; 33 W. R. 396; 15 Cox C. C. 611; 49 J. P. 374 (1884). The evidence had nothing to do with the commission of the crime, nor was the appellant guided or helped to the commission of the crime by the solicitor's advice; it was therefore privileged.

[DARLING J.: In *Cox and Railton*, Grove J. said, in the course of the argument, "The privilege is the client's, as has often been said, not the solicitor's, so it would seem reasonable to say the criminal motive or purpose in the client would destroy it."]

Evidence by Dr. Spillsbury and Dr. Willcox was wrongly admitted. They were asked, "From the size of the bodies and the size of the baths, would the death of any one of the three women be consistent with accidental death?" This was not a question of medical science, but the very question which the jury had to decide. Other such questions were also asked which were not on matters requiring medical skill.

The theory of the prosecution was that the legs of the deceased had been lifted up and kept up so as to submerge the head. The judge told the jury that they could discard this theory, and that they could suggest one for themselves; he even suggested a new theory himself, which the defence had had no opportunity of meeting. This amounted to misdirection. He also suggested the possibility of a drug having been used. There was no evidence of this, and the suggestion that the jury might consider a question as to which there was no evidence, tended to looseness of thought in dealing with other matters.

The jury must have been prejudiced against the appellant by an answer given by the mother of his legitimate wife. She was asked to fix a date, and answered, "After he had done his two years." It is true that the judge warned the jury to disregard the fact of his previous conviction, but the mischief had been done.

The judge commented most strongly on the fact that the appellant did not give evidence, which he said was practically tantamount to an admission of guilt. His comments went further than any I have ever heard.

1915
29 *July*.

GEORGE JOSEPH SMITH.

Reading L.C.J. Darling J. Lush J.

Bodkin (with him *Travers Humphreys* and *Cecil Whiteley*) for the Crown. The Crown would like the Court to consider what amount of evidence must be given or foreshadowed in such case to render admissible evidence of other cases, and whether the judgment of Windeyer J. in *Makin* was not right when he held that it was not necessary that the evidence need be of such a character as to amount to a *primâ facie* case as regards the particular act with which the prisoner is charged. It is submitted that where there is evidence, circumstantial or otherwise, that the prisoner did the act, but no evidence that the act was designed, and consequently no case to go to the jury, then evidence of the other cases may be given to shew design, or may be taken into account to satisfy the jury that the prisoner did the act with which he is charged.

[The LORD CHIEF JUSTICE: What do you say was the evidence constituting a *primâ facie* case here?]

The appellant, although married to someone else, went through a form of marriage with Munday. He appropriated all her money and deserted her. Eighteen months later they met accidentally, and a letter was written to her relations, in which she acquiesced, giving his reasons for leaving her, and having reference to her money, which she was said to have lent to him. A few months later they were at Herne Bay, living in a house alone together. Mutual wills were made, but as Munday had all the money and the appellant none, this was a mere blind. He then got counsel's opinion as to the effect of Munday's settlements; on the 2nd July he learnt that, with the exception of £8 a month paid her by her uncle, he could secure none of her money except by her death. On the 6th July he selected a bath, although they had got on without one for five or six weeks, and the particular bath chosen was of a most inconvenient size, and was put in a most inconvenient room far from the water supply; the door of the room had no lock. It had never been suggested that Munday suffered from any illness until after the bath was delivered, but then he took Munday to Dr. French, and described her symptoms in such a way as to induce Dr. French to think that she had had an epileptic fit. Evidence was given that it was very unusual for a woman of that age to have a succession of epileptic fits. On the day before her

1915
29 *July*.

GEORGE JOSEPH SMITH.

Reading L.C.J.
Darling J.
Lush J.

death Dr. French found Munday in perfect health though rather tired, this being caused by the very hot weather. According to the appellant's statement before the coroner, the couple got up together at 7.30 a.m.; it was 8.10 before the doctor was at the house, he having been sent for by the appellant. He found her dead in the bath, with her legs straight out with her soles up against the side of the bath. In no other position could a woman of that height be placed in that bath so that her mouth and nose should be under the water. According to the medical evidence the position of the legs was inconsistent with an epileptic fit. No communication as to the time of the funeral was made to her relatives, and after it he disappeared, instructing the solicitor and the bank not to let anyone know where he was. He had passed as Williams at Herne Bay, but the money was transferred to him in the name of Smith. On arrest he denied having had anything to do with Herne Bay. There was clearly *primâ facie* evidence that he caused Munday's death by drowning; he had a motive for causing her death, and the evidence excludes any reasonable possibility of the death having been accidental. No one else had the motive and the opportunity for causing her death, and it was the appellant who laid the foundation for the doctor's suggestion of epilepsy.

Marshall Hall did not reply.

The LORD CHIEF JUSTICE: The appellant was convicted of the murder of Bessie Munday. He appeals to the Court on questions of law which have been raised with reference to the admission of certain evidence and to the summing up. We have had the advantage of hearing a powerful and able argument by Mr. Marshall Hall on behalf of the appellant, and none the less forcible because it has been condensed so as to deal with the real points in the appeal.

The appellant was charged with the murder of Bessie Munday; evidence was admitted to shew that he murdered two other women at a later date. The first question raised is that the judge was wrong in admitting evidence of the deaths of Alice Burnham and Margaret Lofty. Whether the evidence was admissible or not depends on principles of law which have been considered by this Court many times, and which depend in the main on the statement of the law by Lord Herschell in *Makin* v.

1915
29 *July*.

GEORGE JOSEPH SMITH.

Reading L.C.J.

Attorney-General for New South Wales. The Lord Chancellor there points out: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." Now in this case the prosecution tendered the evidence, and it was admitted by the judge on the ground that it tended to shew that the act charged had been committed, that is, had been designed. A question has been raised on which we have heard valuable arguments, but it is a matter which we need not, and do not intend to decide in this case. It is undesirable that we should decide the point unless it has been fully argued. It is sufficient to say that it is not disputed, and could not be disputed, that if as a matter of law there was *primâ facie* evidence that the appellant committed the act charged, evidence of similar acts became admissible, and the other point does not arise for the reason that we have come to the conclusion that there was undoubtedly, as a matter of law, *primâ facie* evidence that the appellant committed the act charged apart altogether from the other cases. Viewing the case put forward with regard to Bessie Munday only, we are of opinion that there was a case which the judge was bound in strict law to put to the jury. The case was reinforced by the evidence admitted with reference to the other two cases for the purpose of shewing the design of the appellant. We think that that evidence was properly admitted, and the judge was very careful to point out to the jury the use they could properly make of the evidence. He directed them more than once that they must not allow their minds to be confused and think that they were deciding whether the murders of Burnham and Lofty had been committed; they were trying the appellant for the murder of Munday. We are of opinion therefore that the first point fails.

1915
29 *July*.

GEORGE JOSEPH SMITH.

Reading L.C.J.

The second point taken is that even assuming that evidence of the death of the other two women was admissible, the prosecution ought only to have been allowed to prove that the women were found dead in their baths. For the reasons already given in dealing with the first point, it is apparent that to cut short the evidence there would have been of no assistance to the case. In our opinion it was open to the prosecution to give, and the judge was right in admitting, evidence of the facts surrounding the deaths of the two women.

The third point taken is that evidence was admitted of communications between a solicitor and client which ought not to have been admitted. It is clear to us that the evidence was properly admitted within the authority of *Cox and Railton*, especially the observations of Bovill C.J. and Cockburn C.J., which have been quoted. It is a well-known principle of law that evidence can be admitted of communications between a prisoner and his solicitor, if, as in this case, the prisoner had consulted the solicitor how he could commit the offence, or whether it was necessary or desirable to commit it. This point therefore fails.

Observations have been made with reference to certain questions which were put to Dr. Willcox and Dr. Spillsbury; it is said that the doctors could not be asked to decide by answers in evidence the very point which the jury were being asked to decide. When one examines the questions it is obvious that they were put hypothetically, that is, assuming the facts stated in evidence to be true, could the deaths of any one of the three women have been caused in a particular way? It was really asking for the benefit of their knowledge and skill as to facts which for the moment they were asked to assume. It appears very clearly when one bears in mind that it was suggested that Munday had died in consequence of an epileptic fit, that the experience of the doctors would be very useful in determining whether her death was accidental as was alleged.

There are four other points which may be dealt with as one. It is contended that the judge in the course of his summing up put forward a new theory which had not been discussed by counsel, and which was mentioned for the first time in the summing up. He said it was possible, according to a demonstration given when summing up, that the body had been lifted into the bath in a manner which he illustrated. It is contended, and rightly, that

1915
29 *July.*

GEORGE JOSEPH SMITH.

Reading L.C.J.

no such suggestion had been made in the course of the proceedings. He also made suggestions as to the headaches before the deaths which have been criticised. During the case theories had been put forward by the prosecution, one as the main theory, and a possible second, how the death had occurred, and the defence had also put forward a theory. The judge stated the principle correctly; he said, "It is not necessary for you to be clear in your mind as to the exact mode, if you are satisfied that the prisoner killed the woman." That is not challenged; the woman's death was caused by drowning, the exact method was not proved, but that was not necessary so long as the jury were satisfied that the death by drowning was caused by the prisoner. We think it would have been better if the judge had not put forward a new theory, but it is clear that amongst a number of suggestions he has added one possible one, and that he told the jury they must come to their own conclusion about it. In that he was perfectly right.

The only other matter we have to deal with is this. It is said that the jury were prejudiced against the appellant by the evidence of Caroline Thornhill. It was an unfortunate incident, but it was not due in any way to the carelessness of counsel, who put the question quite rightly, but the witness could only fix a certain date by reference to a period of two years' imprisonment which the appellant had served. The judge at once, and again in his summing up, directed the jury not to allow the question to affect them. We cannot think that the answer affected their decision.

It is further said that the judge commented on the fact that the appellant did not give evidence. It was open to the judge to make such comment, and there is no ground for interference by this Court. The Court has come to the conclusion that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for the Appellant—*W. P. Davies.*

A. L. B. T.

1915
29 *July*.

Reading
L.C.J.
Darling J.
Lush J.

AGNES JANE STARLING.

Severity of sentence.

This was an appeal against conviction and sentence, by leave of Lush J. Appellant was convicted on the 30th June, 1915, at the Essex Sessions, of larceny, and was sentenced to three months' imprisonment in the second division.

Eustace Fulton for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was charged with stealing a watch and chain, with certain attachments, from her brother. She stated she had a claim to the watch and chain. They had, according to the evidence, been given by her to her brother, he gave them back to her, and later she returned them to him. She made no claim to the attachments, but said she did not notice that they were attached to the chain. The chairman said to the jury, "As this man has had seven years' unmolested possession of the watch and chain his sister had no right to take them away without his authority." This was a misdirection; he should have told them that if she thought she had a *bonâ fide* claim of right to them that would negative the felonious intent. (He was stopped.)

E. H. Tindal-Atkinson for the Crown. There was ample evidence that the watch and chain belonged to the brother. At the trial she gave her evidence in such an incoherent way that I thought it best not to cross-examine her. If there had been no summing up at all the jury would have convicted her, so there has been no miscarriage of justice.

Lush J.: The appellant was convicted of larceny and was sentenced to three months' imprisonment in the second division. She was charged with stealing a watch and chain, and one or two trinkets which were attached to the chain. It is clear that she took the watch and chain from the possession of her brother, and she was charged with stealing them. She gave evidence, and the chairman in the course of his summing up to the jury said, "As this man has had seven years' unmolested possession of the

1915
29 *July.*

AGNES JANE STARLING.

Lush J.

watch and chain his sister had no right to take them away without his authority." That passage has been criticised, and no doubt it might be thought to put the question incorrectly, but looking at the summing up as a whole, we cannot say that there has been any real miscarriage of justice.

As to the sentence, she has never been convicted on indictment before, and we think the proper course will be to bind her over on her own recognisances.

Sentence reduced.

A. L. B. T.

FRANCES MAY JOWSEY.

30 *July.*

In simple cases of appeal against sentence the Court will treat the application for leave as the final hearing, and will not insist on the appearance of counsel for the respondent.

Primâ facie, *imprisonment as a sentence on a first offence, for larceny, should be "in the second division."*

Application for leave to appeal against sentence. The applicant was convicted, before Ridley J., at York Assizes on July 12th, 1915, of larceny as an officer of the Post Office, and was sentenced to six months' hard labour.

Chas. Mellor for the applicant. The applicant was convicted of having stolen in February, 1915, while in the employ of the Post Office authorities at Malton, Yorkshire, two letters containing postal orders of the value of 5*s.* 6*d.* and £1 respectively. There was also evidence that she had for some six months previously to February, 1915, stolen from the cash drawer at the post office various small sums amounting, it was suggested, to 3*s.* per week. She was not tried for these latter offences, which were alleged by a Post Office official in the course of his evidence, and with which it was impossible to deal owing to the fact that such allegations were entirely unexpected. In these circumstances it is suggested that the sentence passed upon the applicant was too severe, and that leave should be given to appeal against it.

1915
30 *July*.

FRANCES MAY JOWSEY.

Reading L.C.J.

The LORD CHIEF JUSTICE: In determining the question whether or not the sentence passed upon this applicant was too severe, regard must be had to the fact that she was not found guilty of an isolated theft. There were two distinct thefts of postal orders, and there was, further, evidence that she had been in the habit of robbing the Post Office of small sums for a considerable time. The Court must also bear in mind that offences committed by Post Office employees as such cannot be viewed in the same way as if they had been committed against private individuals. In cases of the former class the interests of the public must be guarded, and severe sentences must be imposed in order to effect this end. Having regard to all these circumstances, we find ourselves unable to reduce the sentence passed on the applicant, which cannot be said to be too severe. The sentence, however, was one of six months' imprisonment with hard labour. As the applicant has never been convicted of an offence before, the sentence should be altered to a term of six months in the second division.

It has not been the practice of this Court to make any reduction or alteration in sentences in the absence of counsel appearing on behalf of the prosecution. But it would have been ridiculous in this case to cause an expenditure of public money for the purpose of the prosecution being represented when we had determined on such an alteration in this sentence. We therefore departed from our usual practice. I only desire to add that in such cases, when the Court is of opinion that no difficulty can arise, and that there is nothing which the prosecution could properly urge against the reduction or alteration of a sentence, the Court will deal with the question of such reduction or alteration on the application for leave to appeal.

Sentence reduced.

Solicitors for the Appellant—*Crombie & Sons*, York.

G. B.

ABRAHAM ALTSHULER.

1915
30 *July*.
Reading
L.C.J.
Darling J.
Lush J.

In every case where there is an incriminating statement by a co-prisoner, the jury should be carefully directed on the relevant law.

This was an appeal against conviction on points of law. Appellant was convicted on the 29th June, 1915, at the West Riding Sessions, holden at Leeds, of feloniously receiving stolen property, and was sentenced to three months' imprisonment with hard labour.

Waddy for the appellant, who had been granted bail. The appellant was charged with Aarons and Glassman with the larceny of seventy gold rings, the property of a jeweller at Dewsbury. There was no evidence of larceny against the appellant, and the Chairman so directed the jury. Statements made by the other two prisoners were put in; I submitted that they were not evidence against the appellant, and cited *Norton* (1910) 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 602; 26 T. L. R. 550; 5 Cr. App. R. 65; and *Christie* (1914) A. C. 545; 83 L. J. K. B. 1097; 111 L. T. 220; 78 J. P. 321; 30 T. L. R. 471; 58 S. J. 515; 10 Cr. App. R. 141. The Chairman refused to stop the case against any of the prisoners, and I called the appellant as a witness. The Chairman, in his summing up, apparently intended to direct the jury to acquit the appellant, and possibly for this reason gave them no direction as to the statements made by the other prisoners. The jury, however, convicted him. (He was stopped by the Court.)

R. J. Sutcliffe for the Crown. I agree that the Chairman gave no direction on the statements made by the other prisoners, but the prosecution admitted in the course of the argument that statements not made in the appellant's presence could not be evidence against him. He had admitted that the rings were in his shop. I agree that the Chairman intended to direct the jury to acquit him, but the jury convicted him, and on the evidence there has been no miscarriage of justice.

The Lord Chief Justice: The appellant, Altshuler, was convicted with two other prisoners of receiving a quantity of rings

1914
20 Jan.

REX
v.
ALBISTON.

which had been taken from a portfolio a day. The facts, so far as they are material to Albiston's case, are quite simple. He was put charged by the stealing, but Chapman appeared at his shop with some of the cards. A man said some of the cards and excused himself by saying he had purchased them from Albiston. There was also a piece of evidence given by a lady employed at the shop which evidently commended itself to the Chairman, but all that was not, in the Chairman's mind, sufficient to convict the appellant, he being of opinion that the other persons' statements could not properly be admitted as evidence of the facts against the appellant. Looking at the summing up, it is quite clear that the Chairman intended the jury to acquit the appellant. He did not think there was evidence on which they ought to convict Albiston, but they did convict all three. It illustrates how important it is in cases of this character where there are such questions as arose in Norton and Oliphic, that a careful direction should be given, so that the jury may understand the exact effect to be given to the evidence. If there was any doubt in the matter we have the Chairman's view in his report to the registrar, which makes it clear that he thought the appellant ought to have been acquitted. We think that notwithstanding the argument very properly and well put by Mr. Sutcliffe, the conviction cannot stand.

Conviction quashed.

Solicitors for the Appellant—Corbett, Hemming & Cook, for *H. T. & W. Pullan*, Leeds.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE BAILHACHE.

EDWARD WARD ALIAS SECKREE.

1915
20 *August.*

If lawful possession, within s. 58 of 24 & 25 Vict. c. 96, the Larceny Act, 1861, is established, the onus *is upon the prosecution to shew that defendant had a guilty purpose.*

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted on the 3rd July, 1915, at the Middlesex Sessions, of being in possession of housebreaking implements by night without lawful excuse, and was sentenced to nine months' imprisonment with hard labour.

Roome for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The Deputy-Chairman misdirected the jury by telling them that once the tools, which were a bricklayer's chisel and screwdriver, were found on him the burden was on the appellant of satisfying the jury that the possession was innocent. The appellant is a bricklayer, and these were his own tools. (He was stopped by the Court.)

Metcalfe for the Crown. Under s. 58 of the Larceny Act, 1861, 24 & 25 Vict. c. 96, "Whoever shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock, key, crow, jack, bit, or other implement of housebreaking . . . shall be guilty of a misdemeanour." The statute couples all housebreaking tools together; the tools in this case, though bricklayers' tools, could

1915
20 *August.*

EDWARD WARD ALIAS SECKREE.

Reading L.C.J.
Ridley J.
Bailhache J.

also be used for housebreaking; it was therefore for the appellant to prove his innocence.

[BAILHACHE J.: If a bricklayer is found with the tools of his trade, which are his own property, upon him, does not that constitute a lawful excuse?]

I submit not. The appellant ran away and hid himself when seen by the police; and there were other circumstances pointing to his possession being guilty.

The LORD CHIEF JUSTICE: The appellant was convicted of being in possession of housebreaking implements by night. The point on which the appeal turns is that the Deputy-Chairman directed the jury that it was for the appellant to establish to their satisfaction that his possession was lawful. It is right to say that notwithstanding the fact that chisels and screwdrivers are not enumerated in the statute, there is clear authority to be found in *Oldham*, 2 Den. C. C. 472; 21 L. J. M. C. 134; 3 Car. & K. 249; 16 Jur. 505; 5 Cox C. C. 551 (1852), that it is a question for the jury in the case of implements which are commonly used for lawful purposes, but which can be used for housebreaking, whether the possession is innocent or not. The case had reference to keys, which were not picklock keys, but the court found that they were capable of being implements of housebreaking if so intended. So it is right to say that these tools might be housebreaking tools. But as that point is established by authority, the next point is whether the appellant had lawful excuse for their possession. The case for the prosecution is that he is a bricklayer, and these are bricklayers' tools, but they rely on other circumstances to shew that they were not being used for innocent purposes, but for purposes of housebreaking. The moment it is admitted that he is a bricklayer and that they were bricklayers' tools, that is a lawful excuse for possession. It would have been different if they had been found in the possession of a farmer. Therefore the appellant had shewn lawful excuse for their possession, but the Deputy-Chairman directed the jury that the burden was still on the appellant of proving that he had no intention of using them for felonious purposes. That is where

1915
20 *August.*

EDWARD WARD ALIAS SECKBEE.

Reading L.C.J.

we think the trial in this case went wrong. The case might have been left to the jury on a direction that *primâ facie* a sufficient excuse had been shewn, but that they must consider the other circumstances. But no such direction was given. That which was given was not in our opinion correct, and therefore the conviction must be quashed.

Conviction quashed.

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE BAILHACHE, AND MR. JUSTICE LOW.

1915
20 *August.*

SAMUEL HOPLEY.

An intent to defraud may be inferred from the wilful use of a forged instrument to support a genuine claim.

This was an appeal against conviction by leave of Lush J. Appellant was convicted on the 6th July, 1915, at the Chester Assizes, before Scrutton J., of attempting to obtain money under a forged instrument, and with uttering a forged instrument, and was sentenced to three months' imprisonment in the second division.

Ellis Griffith, K.C. (with him *Artemus Jones*) for the appellant, who was not present. The appellant was tenant of a farm of which one Warren was the landlord; the appellant was also tenant of a mill from which certain foodstuffs were sent to be used on the farm. Entries of the foodstuffs sent were made on tickets of which copies were kept at the mill. In January, 1914, the landlord gave notice, expiring on the 2nd February, 1915, determining the tenancy of the farm, and early in 1915 an arbitration under the Agricultural Holdings Act was pending. Without the appellant's knowledge, the signatures of two workmen at the mill were added to the tickets by his daughter to shew that certain foodstuffs had been received by them. These tickets were sent to Mr. Hughes, the appellant's agent, and by him to the landlord's agent, and they were produced at the hearing of the arbitration. Before that time the appellant became aware that the signatures had been added to the tickets. At the trial the defence admitted that these signatures had been added by the appellant's daughter, but gave evidence to shew that the foodstuffs mentioned

1915
20 *August.*

SAMUEL HOPLEY.

Ridley J.
Bailhache J.
Low J.

on the tickets had in fact been delivered at the farm, and it was contended that, as the stuff had been delivered there was no intent to defraud, even though the names had been added to the slips.

Misdirection was alleged because the judge told the jury that if they were satisfied that the two men's names had been added to the tickets, and that the appellant knew it at the arbitration, and yet kept silent, intent to defraud could be inferred, even though the stuff had been sent. He did not direct them that there must be an intent to defraud proved on each charge.

[BAILHACHE J.: Is it lawful to support a perfectly *bonâ fide* claim by forging a signature which is an important part of a document to be put in evidence?]

If the claim is an honest one it negatives the attempt to defraud. In *Wilson*, 2 Car. & K. 527; 1 Den. C. C. 284; 17 L. J. M. C. 82; 2 Cox C. C. 426 (1848), on which the judge apparently relied, the facts were entirely different. It is true that there was evidence that at the arbitration the appellant implied that the signatures were genuine. The judge did not deal at all in his summing up with the question whether the foodstuff had in fact been delivered or not.

Trevor Lloyd, for the Crown, was not called upon.

RIDLEY J.: In this case Mr. Ellis Griffith asks us to dissent in some particulars from the summing up of Scrutton J. At the trial the appellant was charged with using forged documents at an arbitration with intent to defraud; he was charged with endeavouring to obtain money by means of them, and with uttering them. He had been tenant to a landlord in Cheshire, and at the close of his tenancy there was an arbitration, the tenant claiming compensation and the landlord claiming for dilapidations. At the arbitration it became very material to ascertain what foodstuffs had been used on the farm. Certain men employed on the farm were called at the arbitration to say a certain amount had been used, others to say it had not been used. For the purposes of this case we will assume, though the jury did not find so, that it was a *bonâ fide* claim on the part of the appellant, but at the arbitration documents were produced

1915
20 *August.*

SAMUEL HOPLEY.

Ridley J.

bearing the signatures of two men. The appellant was asked whether the documents and the signatures were correct; he said "Yes." In fact, his daughter had signed the names without his knowledge; he did not know this until after the documents had been delivered to his representative, but at the hearing he did know that they were not genuine signatures; yet he allowed them to be produced and used.

The question which now arises is whether the summing up dealing with this situation was correct or not. Intent to defraud is a necessary element in many offences, but there are different forms of it. One case is where there is no claim at all; there is no question about the intent there. Another case is where there is a genuine claim which a man could prove if he adopted proper means, but in respect of which he uses documents which are not genuine. Because he might have done a certain thing honestly it does not follow that he cannot be convicted if he uses false documents; the jury may well find an intent to defraud. The judge put the matter correctly in his summing up. He intended to say that there must in each case be an intent to defraud, but in this case, where a material part of the document which made the claim genuine was put forward falsely, knowing it to be false, the jury might well find an intent to defraud. That is not to say that they must, but there is evidence on which they can do so. In our opinion the summing up was correct, and the verdict of the jury cannot be interfered with.

Appeal dismissed.

Solicitors for the Appellant—*Marshall & Pridham*, Agents for *H. S. K. Feltham*, Crewe.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE ROWLATT.

WILLIAM FREDERICK WILSON.

1915
18 *October.*

To suggest to a defendant in cross-examination that he has been connected in business with a "rogue," and that he "gets money out of" persons and does not repay it "tends to shew that he . . . is of bad character" within s. 1 (*f*) *of the Criminal Evidence Act*, 1898.

Fisher, 3 *Cr. App. R.* 176 (1909), *affirmed.*

This was an appeal against conviction on points of law. Appellant was convicted, on the 26th August, 1915, at the County of London Sessions, before the Acting Deputy-Chairman, of obtaining money by false pretences, and was sentenced to three months' imprisonment in the second division.

Sidney Edwards for the appellant, who had been granted bail and who was present. The ground of appeal is that questions were put to the appellant in cross-examination which only tended to shew that he was of a generally fraudulent disposition, and therefore were inadmissible within the judgment of Channell J. in *Fisher*, [1910] 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176. The following were the questions on which I rely:—

"Q. The war having put an end to your betting business, you then started as the Express Photo and News Agency ?

A. Yes.

Q. Were you not associated in that Express Photo and News Agency with a man of the name of Smith ?

A. I was associated to a certain extent. I was supplying him with news.

Q. But was not Mr. Smith a partner in that concern ?

A. No.

1915
18 *October*.

WILLIAM FREDERICK WILSON.

Darling J.
Avory J.
Rowlatt J.

Q. He was not?

A. No, I was not a partner with Mr. Smith.

Q. You were not a partner?

A. No.

Q. The name of the Express Photo and News Agency was your office?

A. The Express News Agency was carried on in the first place by Mr. Smith at 26, Charing Cross Road. When he gave up business I took over his business with the Express News Agency in October or November.

Q. When you say "when he gave up business" do you know a paper called *Truth?*

A. Yes.

Q. Do you know that they have a column which they call "The Rogues' Column"?

A. Yes.

Q. Do you know that this News Agency with which you were associated with Mr. Smith——

Mr. Edwards: He was not.

The Acting Deputy-Chairman: He said he was not a partner.

Mr. Edwards: This is most improper, and nothing whatever to do with this case.

Mr. Beaufoi Moore: In cross-examination I am entitled to ask these questions.

Mr. Edwards: You are not entitled to mislead the jury. I object most strongly to it.

Mr. Beaufoi Moore: Do I understand that after, as you put it, Mr. Smith discontinued this News Agency, that you carried it on?

A. I took on what was left of it.

Q. Was there anything left of it?

A. Yes, there was.

Q. You know what *Truth* described it as, do not you? I will read the report.

The Acting Deputy-Chairman: You cannot read it. You can ask him whether he knows it has been described as so and so.

Mr. Beaufoi Moore: Do you know it has been described as a scheme for obtaining war news which was fraudulent?

A. No, I do not."

Later the appellant was asked whether he had "got £25 out

1915
18 *October.*

WILLIAM FREDERICK WILSON.

Darling J.
Avory J.
Rowlatt J.

of Mr Ryan," and whether he had ever paid it back. (He was stopped by the Court.)

Beaufoi Moore for the Crown. The questions were admissible; and even if they were not there has been no miscarriage of justice. See *Kurash*, [1915] 2 K. B. 749; 84 L. J. K. B. 1497; 79 J. P. 399; 11 Cr. App. R. 166 (1915).

AVORY J.: In this case there was ample evidence upon which the jury might properly convict the appellant. There was a very careful and lucid summing up by the Acting Deputy-Chairman, in which every question which the jury had to decide was carefully put before them in writing, and if no objection could have been taken to the admissibility of any of the evidence this Court could not interfere. But objection is taken before us that in the cross-examination of the appellant the principles laid down in the Criminal Evidence Act, 1898, which govern the cross-examination of a person charged who is called as a witness on his own behalf have been violated. That Act provides, by s. 1 (*f*): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any questions tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to shew that he is guilty of the offence wherewith he is then charged; or

(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii.) he has given evidence against any other person charged with the same offence."

The first question we have to consider is whether in this case the questions asked tended to shew that this man was a man of bad character. If they did we have to consider whether they can be justified under the exceptions. [His Lordship read the questions quoted above.] It is clear that these questions sug-

1915
18 *October.*

WILLIAM FREDERICK WILSON.

Avory J.

gested that the appellant had been associated with a man named Smith in a business called "The Express News Agency," that that business had been exposed in the "Rogues' Column" of *Truth*, and that he was asked whether he knew that that business had been described as a business for obtaining war news fraudulently. That could only mean that the appellant had committed an offence in connection with this business, or was a person of bad character. Then their attention was drawn to further questions. An observation made by Mr. Moore himself with regard to them puts him out of court, for he says, "Although the question has nothing to do with Fleming & Co., it has to do with you, and shews that you have been getting money from others without paying it back." Then it was said in cross-examination, "You got £25 out of Ryan," and he was asked why he did not pay his liabilities. I think the jury would understand from that that the money had been obtained from Ryan in some improper manner, that the appellant was a person of bad character who got money by improper means and did not pay his debts, although possessed of means to do so. Were they relevant to prove this particular offence? The answer is to be found in the judgment of Channell J. in *R.* v. *Fisher*, which was also a case of false pretences. He says, "The principle is that the prosecution is not allowed to prove that the prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character, and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that it proves that the prisoner has committed another offence." Again, later he says, "Applying these principles to this case, the charge here is that the prisoner obtained the pony and cart from the prosecutor by making certain statements. The falsity of those statements is not proved by giving evidence that in other cases the prisoner made other false statements, though it does tend to shew that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a par-

1915
18 *October*.

WILLIAM FREDERICK WILSON.

Avory J.

ticular manner, his guilt cannot be proved by shewing that he has also swindled in some other manner." We think those words exactly applicable to this case. What the cross-examination sought to establish was that this man was swindling other people by other means, and therefore that he was swindling in this case.

The next question is whether there was a substantial miscarriage of justice. This is not a case in which the Court can say that there has not been such a miscarriage, for that can only apply where the Court can also say that the jury certainly would have come to the same conclusion if the evidence objected to had not been given. It is impossible to say that here. The jury was asked whether the appellant did this with intent to defraud; and it is difficult to imagine evidence more calculated to induce a jury to convict than to say that he has been described in newspapers as a rogue without protest on his part. Therefore the appeal will be allowed, and the conviction quashed.

Conviction quashed.

Solicitor for Appellant—*Guy Wallington.*

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE HORRIDGE, AND MR. JUSTICE ROWLATT.

1915
25 *October.*

ERNEST ST. GEORGE CAUSTON.

Severity of sentence mitigated in view of lapse of time between the crime and the prosecution.

In determining the amount of a sentence the Court considers the appellant's prospect of rehabilitating himself and making restitution.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted on the 9th September, 1915, at the Central Criminal Court, before Sankey J., of fraudulent conversion, and was sentenced to four years' penal servitude.

Curtis Bennett for the appellant, who was not present. The appellant was a solicitor who pleaded guilty to converting various sums, amounting in all to just over £600. He was acting for beneficiaries under a will who lived in New Zealand, and the money in question was the proceeds of the sale of land belonging to those beneficiaries. The first offence occurred in October, 1911, at which time his wife and children were ill, one child seriously, and he had got into difficulties by assisting a friend financially. In 1912 he wrote to his clients telling them what he had done, and he wrote later to Messrs. Duffield, a firm of solicitors who were acting for one of the beneficiaries, saying what he had written to his clients, and enclosing a cash statement. In 1913 the appellant was adjudicated bankrupt, and a receiving order was made on 20th October, 1913. He asked Messrs. Duffield that their client's debt should not be proved, as such a course would result in criminal proceedings; they did not prove for the debt, nor did they institute criminal proceedings. After his public examination he went to Canada,

1915
25 *October.*

ERNEST ST. GEORGE CAUSTON.

Darling J.
Horridge J.
Rowlatt J.

where he found employment as a clerk. If a short sentence is given he will be taken back into that employment. He will in due course be struck off the rolls.

Roland Oliver for the Crown. The prosecution was instituted by the official receiver in consequence of certain information given him by Messrs. Duffield. My instructions are that since the appellant went to Canada he has done his best to earn an honest living.

DARLING J.: The appellant misappropriated trust funds four years ago, and afterwards became bankrupt. In the bankruptcy he did not disclose the debt owed to the persons whose funds he had taken, and he explained to the solicitors who were then acting for the beneficiaries why he had taken this course. They might have brought the whole matter forward by proving in the bankruptcy, but they did not do so, and allowed the matter to sleep. The appellant went to Canada, where he got honest employment as a clerk, and he was acting in that capacity when he was arrested, not at the instance of the people whom he had robbed, but of the public authority. The public authority was perfectly right, and the only question is whether the sentence passed is too severe. The appellant has not yet been struck off the rolls, but that is only because there has been no sitting yet of the court which deals with those matters; he will be struck off the rolls as a matter of course. It is not suggested that he will attempt to get a living in this country; it is stated that his one object is to earn money to replace that which he has taken.

In ordinary circumstances the Court assuredly would not think the sentence too much for a fraudulent breach of trust by a solicitor, but the circumstances here are not ordinary; they are much out of the common. All the defalcations were committed four years ago; they were acknowledged, and the matter was explained to the solicitors, who took no action either in the bankruptcy or in the criminal courts. In all the circumstances we feel certain that this case can never be cited as a precedent for the sentence to be imposed on fraudulent solicitors. The sentence in our opinion must be reduced, and it is useless here to make a slight reduction. The appellant is trying to redeem his fault for the sake of his wife and children, and for the sake of the persons defrauded, to

1915
25 *October*.

ERNEST ST. GEORGE CAUSTON.

Darling J.

whom he still owes the money. The object in making a reduction in the sentence would be frustrated if the reduction made is only slight. We therefore reduce it to one of six months' imprisonment in the second division.

Sentence reduced.

Solicitor for Appellant—*H. Pfahl.*

A. L. B. T.

The Court (the Lord Chief Justice, and Bray and Atkin JJ.) also sat on November 1st.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE LUSH.

RICHARD GORGES.

1915
8 *November.*

If, on a trial for murder, it is simultaneously suggested by the defence that the alleged act at most amounted to manslaughter and was due to accident, though the judge should deal fully with the latter theory, it is not misdirection if he substantially charges the jury on the former only.

Proviso to s. 1 (4) *of the Criminal Appeal Act applied.*

This was an appeal against conviction on points of law. Appellant was convicted, on the 18th September, 1915, at the Central Criminal Court, before Low J., of manslaughter, and was sentenced to twelve years' penal servitude.

The matter came before the Court on the 25th October on an application for leave to appeal. On the case for the appellant being argued by *Gordon Hewart, K.C.*, it appeared that the ground on which it was desired to appeal was a matter of law. The Court thereupon dismissed the application, but granted an extension of time in which notice of appeal on points of law might be given.

Gordon Hewart, K.C. (with him *J. A. R. Cairns* and *T. Scanlan*), for the appellant, who was present. The appellant was indicted for the wilful murder of a police officer named Young, at Hampstead, on the 14th July, 1915. According to the evidence for the prosecution, on the morning of the 14th July the police obtained a warrant for the arrest of the appellant. Sergeant Askew and Young went to the house at which the appellant was lodging, in his absence, and entered his room, in which they found a service revolver and cartridges of two kinds, one of which fitted that revolver; these they seized. They also found a revolver case

1915
8 *November.*

RICHARD GORGES.

Reading L.C.J.
Avory J.
Lush J.

to hold two revolvers. In the evening the two police officers returned, and the landlady, who was the wife of a pensioned police officer, led them to a staircase which led to the basement in which was a kitchen and a scullery. She told them that the appellant had a revolver. Young went down first, Askew following. On the way down Young stopped suddenly because he saw the appellant in an angle of the staircase with his hands behind his back and fumbling with his right hand. Askew came close to him with his chest against the appellant's, a struggle followed, and Young was fatally shot. As the officers knew that the appellant had a revolver, they might naturally seek to seize it.

The defence was twofold: firstly, that the shooting was accidental, and, alternatively, that at the time the appellant was so saturated with alcohol that, on the authority of *Meade*, [1909] 1 K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 53 S. J. 378; 25 T. L. R 359; 2 Cr. App. R. 54, the jury would be entitled to reduce the crime to manslaughter. In support of the accident theory the appellant gave evidence that he was in the kitchen, very angry at the loss of his revolver, which he explained was not the one which he held in his hand. A knock at the door was heard, and the appellant went upstairs for the purpose of depositing the revolver with a neighbouring publican, named Ince. On the stairs he met the two men and did not appreciate that they were police officers until they asked, somewhat arbitrarily, for his name. Even then he did not know, nor did they say, that they had come for the purpose of arresting him. They both got hold of him, and in the struggle the revolver was accidentally discharged. Four ingredients of this defence were, I submit, well worthy of consideration. Was there a struggle? What was the course of the bullet? Was it a mere accident that the appellant had a revolver in his hand at the time? And was he saturated with drink at the time? because if so a revolver held by him was more likely to be accidentally discharged. Therefore, everything that was said on the question of manslaughter was relevant on the defence of accident. I developed the defence of accident in opening my case to the jury, and I certainly did not abandon it when I made my final speech, though it may well be that I laid the chief stress on the defence of manslaughter. There was plenty of evidence from the witnesses for the Crown that a struggle preceded the shot.

1915
8 *November.*

RICHARD GORGES.

Reading L.C.J.
Avory J.
Lush J.

The ground of appeal is that the judge failed adequately to direct the jury on the defence of accident, and that in one crucial passage he actually misdirected the jury. Nearly all of his summing up dealt with the defence of manslaughter, and he dealt with the theory of accident only in one short passage in the course of which, after stating what the evidence in his view shewed, he said, "I have no hesitaton in saying in these circumstances, if those be the circumstances—and of course, shortly, they are the circumstances of the case—that that is not in law a case of excusable homicide." He thus told the jury the very thing which they had to decide where there was an acute conflict of evidence, and in effect directed them in point of law that they could not accept the defence of accident.

[The LORD CHIEF JUSTICE: Assume that the direction was wrong, but you must deal with the question whether there has been a substantial miscarriage of justice.]

Though the jury might have come to the same conclusion on a proper direction, it cannot be said that they would have done so. It was not suggested that the appellant knew that a warrant had been issued for his arrest. It is true that in a statement made at the police station he described the two men as "detectives," but that, of course, was after his arrest, and when the circumstances had been made known to him. The explanation of the fact that he held the revolver behind his back when he met the police officers is that he was drunk and very angry at his other revolver having been taken; he wished to retain the one he had in any event. Any defence which is disclosed by the evidence should be put by the judge to the jury even though it has not been raised by counsel. *Hopper*, [1915] 2 K. B. 431; 84 L. J. K. B. 1371; 79 J. P. 335; 31 T. L. R. 360; 11 Cr. App. R. 136. But here the defence of accident was raised and maintained.

Cecil Whiteley (with him *R. D. Muir*), for the Crown. The judge properly directed the jury; the words "Of course those are the circumstances of the case" must be read in connection with the earlier part of the summing up where all the facts had been reviewed. Whatever version of the facts is accepted here the appellant was not entitled to an acquittal. It is admitted that

1915
8 *November.*

RICHARD GORGES.

Reading L.C.J.
Avory J.
Lush J.

the revolver which killed Young was in his hand and that his finger was on the trigger; if that is so the defence of accident will not avail him unless he was doing a lawful act; if he was trying to evade arrest or to avoid giving up his revolver to the police he was not doing a lawful act. See *Fenton*, 1 Lew. 179 (1830).

Whether the version of the facts accepted be that of the witnesses for the prosecution, or that put in cross-examination to them at the trial (which differed widely from the evidence given by the appellant), or that contained in either of the appellant's two statements, or in his evidence, the killing amounted at the least to manslaughter. If, therefore, the judge had gone through each set of facts he must still have directed the jury that they could not in law on that evidence find that the killing was accidental.

Hewart, in reply. It is suggested by the Crown that when told the men were police officers the appellant ought to have assumed that he was under arrest. But upon the evidence it was open to the jury to find that, at the time when the revolver was discharged, the appellant did not know either that the men were police officers or that he was under arrest. The mere fact that they were police officers did not entitle them to take his revolver, nor make it a felony for him to keep it. Therefore, a view of the facts is open which admits the possibility of mere accident.

The LORD CHIEF JUSTICE: The appellant was tried on an indictment for murder; the jury found him guilty of manslaughter, and he was sentenced to twelve years' penal servitude. He appeals to this Court to have the conviction quashed on the ground that the judge failed properly to direct, or misdirected, the jury. It appears that Sergeant Askew and Young, the deceased man, two police officers, had a warrant on the 14th July for the arrest of the appellant, and they proceeded to his house. When they arrived at the house, which was kept by an ex-police officer, they found in his room a revolver and a number of cartridges which fitted that revolver, and some which fitted another revolver which was not found. The appellant was absent, so they left and returned later. On going downstairs they found the appellant; he had a revolver upon him, which had either been loaded the night before according to his evidence, or on that day according to a statement which he made in writing at the police station. In any event it was

1915
8 *November.*
RICHARD GORGES.
Reading L.C.J.

a loaded revolver. The evidence shews that when Askew was close to the appellant and Young a step or two below him, the appellant who had his arm behind his back thrust it forward between Askew, who was quite close to him, and himself. Immediately the revolver was fired and Young was shot in the breast and killed. For the prosecution it was said that the appellant, having a loaded revolver in his possession meant to resist arrest, knew that the men had come to arrest him, and used the revolver to save himself from arrest. For the defence it was said, firstly, that the appellant was not guilty of murder; at the most it was manslaughter; and, further, that he was not guilty of any crime because the revolver went off by mere accident, the result of no intentional action on the part of the appellant. As a result of the trial the jury found him guilty of manslaughter.

Mr. Hewart now asks that the verdict should be quashed on the ground that the judge wrongly directed the jury on the defence of accident, and, further, that he misdirected them by telling them that the circumstances in fact would not admit of a verdict of excusable homicide. We have the advantage of having heard a very careful and able argument to-day, and also of knowing what took place at the trial. The Court has said again and again that a summing up is not to be looked at too microscopically as transcribed by a stenographer. We must be satisfied that the judge has made a mistake and has misled the jury before setting a conviction aside. We always have to consider that at the trial a course may be pursued which may have led the judge to take a particular view. In this case we are clearly of opinion that the reason why the judge paid comparatively little attention to the defence of accident is because, as the case proceeded, and after the appellant had given evidence, counsel of skill and judgment evidently came to the conclusion that it would not be wise to rely too much on the theory of accident; looking at all the facts and circumstances it is obvious that counsel came to the conclusion that the safest defence was that the verdict should be one of manslaughter only. There were very obvious difficulties in putting forward a defence on two alternative lines on the evidence given in the case. It is right to say that he never abandoned the defence of accident, but to the end contended that on the facts the killing was accidental, but his substantial defence was that it was manslaughter, and not murder.

1915
8 *November.*

RICHARD GORGES.

Reading L.C.J.

When the judge came to sum up he directed his attention to what he called the substantial point, namely whether the appellant was guilty of murder. One passage has been particularly criticised in which the judge dealt with the defence of accident;—for it is not suggested that he withheld that defence from the jury; he had already dealt exhaustively with the facts and had pointed out that the defence of accident was still relied on. The passage in question is this: "It has been said in the course of the argument, you may say that this was an accident, and I suppose what is meant by that is this: that this was excusable homicide, and that the death occurred in circumstances which ought to expose the prisoner to taking no criminal consequences at all. I suppose that is the suggestion. Well now, gentlemen, what are the facts? A man goes about a house with a loaded revolver, and apparently, if I follow the facts, with his finger upon the trigger of that loaded revolver. Two police officers come into the house. That he knew they were police officers is never, apparently, disputed; on the contrary, by almost necessary inference it is several times admitted, until he gives evidence in this Court, when he says he did not know it. As he says himself in this statement, 'I go up the stairs to see them,' if he did say that; that is in the statement signed by him, 'I have this revolver in my hand; the police try to get it away from me and it goes off and one of the gentlemen is killed.' Gentlemen, I have no hesitation in saying in these circumstances, if those be the circumstances—and of course shortly they are the circumstances of this case—that that is not in law a case of excusable homicide." The words "and of course shortly they are the circumstances of this case" have been the subject of considerable criticism. In our view it would have been better if the judge had dealt more fully with the defence that had been set up, notwithstanding the course taken by the defence at the trial, but we feel that he was led to deal with it as he did by the course taken for the prisoner. We do not think that the jury could have understood the judge to mean that they must assume that their verdict must, as a matter of law, be against the appellant. The judge had already dealt in detail with the evidence on the one side and the other, and had pointed out the matters to be considered by the jury. He ended his summing up by saying, "I do not, of course, gentlemen, withhold from you the consideration of the other question that has been suggested of accident, but I do not think you will

1915
8 *November.*

RICHARD GORGES.

Reading L.C.J.

have any great difficulty in disposing of that." A judge is entitled to say that. In these circumstances, although it would have been preferable if the judge had dealt more fully and accurately with the defence of accident, we cannot think that there has been such a misdirection as would justify us in quashing the conviction, and in any event there has been no substantial miscarriage of justice. On the facts we are of opinion that the jury, if they had been properly directed, would have returned the same verdict. The object of the proviso is to prevent a verdict being set aside because of a mere slip or technicality if in substance the verdict was right. For the reasons given the appeal must be dismissed.

Appeal dismissed.

Solicitor for the Appellant—*Herbert Z. Deane.*

A. L. B. T.

ARTHUR GARDNER AND FRANK HANCOX.

When any one of persons charged separately for the same offence has made a statement implicating another of them, that statement ought not to be read by the police in the presence of all of them in order to elicit a confession or an admission from the latter, and if the trial judge is satisfied that such a course was taken with such a purpose, he should refuse to admit such statement in evidence.

When incriminating evidence is given of a conversation between persons under arrest, overheard by a police officer listening for the purpose, the jury should be warned that they must exercise care in considering whether they are in possession of the whole or only part of such conversation.

These were appeals against conviction; in the case of Gardner on the certificate of the Chairman of Quarter Sessions, and in the case of Hancox by leave of Sankey J. Appellants were convicted, on the 11th October, 1915, at the Worcestershire Sessions, of housebreaking. Gardner was sentenced to twenty, and Hancox to twelve months' imprisonment with hard labour.

Marchant, for the appellants (under s. 10 of the Criminal Appeal Act), who were present. The appellants were charged with

1915
8 *November.*

ARTHUR GARDNER AND FRANK HANCOX.

Reading
L.C.J.
Avory J.
Lush J.

a man named Thomas who pleaded guilty. It was alleged that the three prisoners had broken into a house on the main road between Birmingham and Bromsgrove on the 24th June, and had stolen various articles including a fish basket. The appellants were identified as having been on the road on that day, which was the day of the Bromsgrove Fair, when there were many people about. Gardner was picked out from a number of men by two witnesses, but Hancox was only identified when he was standing in the dock before the magistrates. None of the stolen property was traced to either appellant. The only other evidence against them was police evidence, which was, I submit, of a very unsatisfactory character.

Gardner was arrested on the 27th June, and on the 29th June he made a statement in which he said that he was innocent and would assist in finding the two men who had committed the burglary if he could have a week out on bail. He said that Thomas had asked him to buy some of the stolen property, which he had refused to do. His statement also implicated Hancox. On the 30th June Thomas was received into custody; Thomas and Gardner were placed in adjoining cells, although there were six empty cells in the police station, the communication places were left open and a police-sergeant remained outside and took notes of a conversation which passed between the two prisoners in which Gardner asked Thomas to plead guilty and get him out; Thomas said he was going to and would say they met on the road. Gardner answered, "You don't want to say you seen me at all. You plead guilty and say I was not there. I shall have everybody against me at the Sessions; you have got a character and won't get above six weeks. I might get penal servitude." On the same evening Thomas made a statement implicating Hancox.

On the 2nd July Hancox was received into custody from the Birmingham police, and although he had been charged already was again charged jointly with Gardner and Thomas, whose statements were read over to him by the police-sergeant. Hancox said to Gardner, "You had your say behind my back, I shall say nothing now, but when the time comes and you are in the box with me I shall tell my tale. From what I can see, if it was not for this statement I should not have been here." To Thomas he said, "You have got a month up against me or two or three; at the most you know nothing against me and Gardner, and if it is

1915
8 *November.*

ARTHUR GARDNER AND FRANK HANCOX.

Reading
L.C.J.
Avory J.
Lush J.

proved I shall get a term and he will. If you take it on your own you will keep us out of it and it will be all right." I submit that the evidence of the reading of the statements ought to be rejected, and that, therefore, the evidence of the conversation ensuing on it ought to be rejected also.

Milward, for the Crown. I do not altogether defend what was done, but as it was done the evidence was admissible; the police followed what has been the practice for years. *Christie,* 109 L. T. 746; 78 J. P. 141; 30 T. L. R. 41; 10 Cr. App. R. 141 (1914), seems to contemplate the reading of a statement by a third party to a prisoner, and therefore the evidence was admissible, even though the motive of the police officer may have been improper. Thomas' statement implicated Hancox largely, and it was for the jury to say whether Hancox's answer when it was read over to him was not an acceptance of the truth of the statement. The jury did regard it as such in face of the Chairman's strong caution.

[The LORD CHIEF JUSTICE: What was the purpose of charging the three prisoners together? They had all been charged already and knew what they were charged with. It is a most objectionable practice.

AVORY J.: It is a form of cross-examination, and infringes the rule against cross-examination by police officers.]

On the other hand, if the prisoner is innocent it gives him the earliest chance of proving his innocence.

[The LORD CHIEF JUSTICE referred to *Male and Cooper,* 17 Cox C. C. 689: 1893.]

[LUSH J.: *Best,* [1909] 1 K. B. 692; 78 L. J. K. B. 658; 100 L. T. 622; 25 T. L. R. 280; 2 Cr. App. R. 30, is said apparently to have overruled that case.]

[AVORY J. referred to *Hirst,* 18 Cox C. C. 374: 1896.]

The statements did not affect Gardner. What he said in the cells in conversation with Thomas was sufficient evidence of his

1915
8 *November.*

ARTHUR GARDNER AND FRANK HANCOX.

Reading L.C.J.
Avory J.
Lush J.

guilt. There is no objection to the evidence of that conversation; if two prisoners choose to talk there is no reason why they should not be overheard.

Marchant in reply.

AVORY J.: There are two appellants here, Gardner and Hancox, and their cases must be dealt with separately. They were both convicted of having taken part in a housebreaking offence and having stolen a quantity of property from a cottage. It is true that none of the property was traced to either of them, but neither was it to Thomas, who pleaded guilty. With regard to Gardner there was evidence fit for the consideration of the jury identifying him as one of a number of men who were in the neighbourhood of the cottage on the afternoon in question. The witnesses identified him by picking him out of a number of men in the ordinary way. Apart from anything else, this might not have been sufficient to support his conviction, as he was not seen going out of, or coming into, the cottage; but there was also evidence that Gardner, being in the cell adjoining Thomas's held a conversation with the latter, and it is enough to say that if he held the conversation there was sufficient to justify the jury in finding him guilty. The conduct of the police in listening to this conversation has been condemned, and it has been suggested that the two prisoners were put in adjoining cells in order that they might talk, and that it was improper of the police to listen. It is impossible for the Court to say that prisoners charged with the same offence should never be put in adjoining cells or that the police ought never to listen. Indeed, it has been said that the duty of a policeman is to keep his ears open and his mouth shut. There is no ground on which the Court can say that evidence of this conversation was not admissible. The jury were warned to be careful how they accepted it as it only purported to be a portion of the conversation, and having regard to the fact that the officer was listening to a conversation which he was not intended to hear. They found the appellant guilty, and the Court cannot interfere with the conviction.

The case of Hancox is on a different footing. The only evidence of identification was that of witnesses who said they saw him coming away from the neighbourhood of the cottage carrying a

bag. Not one of them had an opportunity of picking him out from a number of other men. Each one of them saw him for the first time after that day in the dock. It is impossible to say that any jury would have been justified in convicting him on that evidence alone. In addition, evidence was tendered that Thomas made a statement when he was taken into custody, and that that statement was read over to Hancox, when Hancox was placed side by side with Thomas in the dock; evidence was also given that on the statement being read, a statement which in terms implicated Hancox, Hancox said, "You had your say behind my back, I shall say nothing now, but when the time comes and you are in the box with me I shall tell my tale. From what I can see, if it was not for this statement I should not have been here." Then turning to Thomas, he added, "You have got a month up against me or two or three; at the most you know nothing against me and Gardner, and if it is proved I shall get a term and he will. If you take it on your own you will keep us out of it, and it will be all right." That statement, made by Hancox, was obtained in pursuance of a practice which Mr. Milward tells us prevails among the police; it is a practice, after men have been separately charged, of charging them together with the same offence with which they have already been separately charged, and reading over to them statements made by the others behind their backs. That is a practice which must certainly be condemned. It is a form of cross-examination after arrest, and the police have been told over and over again from the bench that they have no right to cross-examine a prisoner after he has been arrested and charged. The difficulty is that, notwithstanding that the practice is to be condemned, there are decisions that when the practice is followed, and the advice given to the police disregarded, if the prisoner answers the statement, and makes anything in the nature of a confession, or says anything material, his statement cannot be excluded in evidence, being a statement by the prisoner which is relevant to the issue. Some day the authorities may have to be reconsidered, but the Court is not prepared to say that the statements made by Hancox were not admissible in evidence, while repeating that if the practice is followed for the purpose of obtaining confessions or admissions it is reprehensible and ought to be discontinued.

We have to consider whether the statement supplies the deficiencies in the evidence against Hancox. There are expressions

1915
8 *November.*

ARTHUR GARDNER AND FRANK HANCOX.

Avory J.

which may amount to admissions that he might get into trouble and imprisonment, but they are also capable of meaning that he would do so if Thomas's statement was believed. We are not of opinion that it amounts so plainly to an admission as to justify any jury in acting upon it. As there was no other satisfactory evidence, the Court has come to the conclusion that the verdict of the jury as regards Hancox cannot be supported, so the conviction in his case must be quashed.

I desire to repeat what I said in the course of the argument, that when such a position as that which was created here arises we think that the judge at the trial ought to refuse to admit evidence of the fact that the statement was read over to the prisoner, when once he is satisfied that it was read over for the purpose of obtaining an admission or confession from the prisoner.

Gardner's case—*Appeal dismissed.*

Hancox's case—*Conviction quashed.*

A. L. B. T.

---

15 *November.*

JOHN JAMES THORNLEY.

Murder.

When the only defence at the trial was that of insanity, the Court will not allow an appeal on the fact.

Criminal Appeal Rule 8 (*c*) *must be observed.*

This was an application for leave to appeal against conviction. Appellant was convicted of murder, on the 27th October, 1915, at the Chester Assizes, before Lord Coleridge J., and was sentenced to death.

Trevor Lloyd for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The only defence raised at the trial in this case was that of insanity, and it may be that I exercised my discretion wrongly on that point. As a result I did not cross-examine on various letters which were said to have been written by the appellant, and which formed strong evidence that

1915
15 *November.*

JOHN JAMES THORNLEY.

Reading L.C.J.
Avory J.
Lush J.

he committed the act; without the letters the evidence against him was not at all strong. By his notice of appeal the appellant denies having written any of the letters except one (Exhibit H). If the Court is satisfied that he wrote the other letters I cannot carry the matter further.

Ralph Bankes, K.C., and *R. O. Roberts*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of the murder of Frances Johnson, and he applies for leave to appeal against that conviction. At the trial the only defence raised was that of insanity; by cross-examination and evidence it was sought to establish that defence. The jury heard the evidence, and the judge gave a proper direction, of which no complaint is made. Now, notwithstanding that at the trial only the defence of insanity was raised, Mr. Lloyd now raises the further point that there was not sufficient evidence that the appellant committed the act. The argument is based, in the main, on certain letters. If those letters were written by the appellant it would be futile to contend that there was not evidence against him which it is impossible to refute. Mr. Lloyd tells us that he did not raise the point at the trial; we think that he was right to take that course, because, on comparison of Exhibit H, which was admittedly written by the appellant, and Exhibit A, on which the prosecution strongly relied, we are all of opinion that they were written by the same person. Therefore the point now taken completely fails; it follows that the application must be dismissed.

We have one observation to make as to the marking of exhibits. By Rule 8 (c) of the Criminal Appeal Rules, 1908, exhibits are to be marked with consecutive numbers for the purpose of readily identifying the same. In this case this course has not been followed, which leads to some confusion. We hope that in future care will be taken to observe this rule.

Application dismissed.

A. L. B. T.

1915
15 *November.*

Reading
L.C.J.
Avory J.
Lush J.

WILLIAM DAVIES.

When a child has given evidence not upon oath under s. 30 *of* 8 *Edw.* 7, *c.* 67, *the Children Act*, 1908, *or s.* 28 (2) *of* 4 *& 5 Geo.* 5, *c.* 58, *the Criminal Justice Administration Act*, 1914, *the judge must direct the jury on the law of corroboration under the former section.*

This was an appeal against conviction, on the certificate of Bailhache J. Appellant was convicted on the 29th October, 1915, at Monmouth Assizes, before Bailhache J., of rape, and was sentenced to three years' penal servitude.

Sherwood for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of rape on a married woman, in whose house he was a lodger; her husband was away at the time on military duty. For the prosecution her two sons Wilfred and Stanley were called. Stanley slept in his mother's room on the ground floor, near the back kitchen, where the offence was alleged to have been committed. He said that he heard his mother shouting "Wilfred, Wilfred," that he went to see what was the matter, and found the appellant on the top of his mother. Wilfred, who slept upstairs, came down shortly afterwards, by which time both parties had got up off the floor. The defence raised was consent, and it was suggested that Stanley came because he heard sounds of excitement, and that it was only when his mother saw him that she called "Wilfred" in order to be able to suggest that what had happened was against her will. The balance of evidence was so evenly poised that one small piece of evidence might have affected the result. Much of the woman's subsequent conduct was inconsistent with rape. The only other person whose evidence was inconsistent with the defence was Stanley; he was a boy of tender years, who gave evidence not on oath under s. 30 of the Children Act, 1908 (8 Edw. 7, c. 67), as applied to all criminal proceedings by s. 28 (2) of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58). The proviso to the former section enacts that "A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating

1915
15 *November.*

WILLIAM DAVIES.

Reading L.C.J.
Avory J.
Lush J.

the accused." The judge did not warn the jury that Stanley's evidence required corroboration; he did not even suggest the desirability of the evidence of the prosecutrix being corroborated. (He was stopped by the Court.)

Roland Oliver for the Crown. If there was in fact corroboration, the fact that no allusion to the necessity for it is made in the summing up is not fatal to the conviction. Some corroboration is to be found in the evidence of Wilfred having regard to the evidence of appellant that prosecutrix never called out for Wilfred at all.

The LORD CHIEF JUSTICE: The appellant was convicted of rape on a married woman, and was sentenced to three years' penal servitude. It has been argued on his behalf that this conviction cannot stand on a number of grounds, but we propose to deal only with the important one. The boy Stanley, a boy of tender years, gave evidence of the utmost importance. The case for the prosecution was that the appellant had lodged with the woman and her husband for two years; appellant's wife also lived in the house until a few months before the time in question, when she died, and he continued to live there as a lodger. The husband of the prosecutrix was absent on military duty. It is sufficient to say that the appellant had supper in the ordinary course with the prosecutrix, her two boys, and a small child of eighteen months. According to the story of the prosecutrix, after sending the boys to bed and putting the baby to bed, she was in the back kitchen, when the appellant ran after her, caught hold of her, and committed a rape upon her. There is no doubt that she called out "Wilfred, Wilfred," but the difficulty is to determine exactly at what point of time. According to her story it was immediately she found that the offence was being attempted. Wilfred was a boy of eleven; he slept on the first floor, and was not yet in bed; Stanley was eight years old and he slept on the ground floor in his mother's room. At some stage Stanley came out of his room, found the appellant on top of his mother, and began to cry. Wilfred came downstairs and saw the appellant getting away from his mother, the mother still being on the floor.

Now the case for the appellant presented at the trial was that he was encouraged by some familiarity on the part of the prose-

1915
15 *November*.

WILLIAM DAVIES.

Reading L.C.J.

cutrix, and that as soon as the boys had gone to bed she said, "Now you can do as you wish," and that he had connection with her with her consent. Whilst they were on the floor she was discovered by Stanley, and saw him standing by, crying; she then shouted, "Wilfred, Wilfred," in order, it was said by the defence, to vindicate herself subsequently, and to be able to say that she shouted out to the elder boy to come, and therefore to afford evidence that the connection was against her will. In this story, the evidence of Stanley became, as I have said, of vital importance. When first called he was rejected as a witness by the judge. Later on, his attention having been called to the Criminal Justice Administration Act, 1914, he allowed the boy to be called. The boy's evidence was to the effect that he heard his mother shout or scream, that he arose, left the room, and found her calling out, "Wilfred, Wilfred." If that is true, it strongly supported the case for the prosecution, because it shews that she shouted before anyone was there, and before she was overtaken with shame. It would shew that when the man began to attack her she immediately began to shout or scream. The evidence of the appellant cannot be reconciled with the evidence of Stanley, because the appellant's story depends on the woman having called out because she saw Stanley.

The judge failed to direct the jury that this was evidence by a boy of tender years, and that under the statute "a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused." That is by s. 30 (a) of the Children Act, 1908, which has been applied to all offences by s. 28 (2) of the Criminal Justice Administration Act, 1914; it therefore applied to this case. Where evidence is given by a child not on oath, in pursuance of these two statutes, it is necessary that the judge should direct the jury not to convict the prisoner on that evidence unless it is corroborated by some other material evidence in support thereof implicating the accused. It is possible that there might be a case where the corroboration is so clear and ample that the Court would not interfere with the conviction, although no such direction was given; but the Court in this case cannot come to the conclusion that with such a caution the jury would have arrived at the same verdict. We are of opinion, there-

1915
15 *November.*

WILLIAM DAVIES.

Reading L.C.J.

fore, that the absence of this direction vitiates the conviction, and that it must be quashed. We must remember, in dealing with the evidence of children who are allowed to give evidence without taking the oath, that Parliament thought it necessary that their evidence should be corroborated; so when the judge in his discretion admits the evidence he should not fail to direct the jury on the point.

It is right also to say that the judge himself took the unusual course of giving a certificate enabling the prisoner to appeal to this Court on facts. That shews that he was doubtful of the propriety of the conviction (*a*). When that further point is added, it is clear that the conviction ought not to stand.

Conviction quashed.

A. L. B. T.

(*a*) But cf. *Carpenter*, 1 Cr. App. R. 210 (1908).

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BAILHACHE, AND MR. JUSTICE SHEARMAN.

1915
22 *November.*

LOUIS BRUHIN.

When a defendant charged with larceny disputes the identity of property found in his possession with that stolen, there must be a clear direction to the jury on the issue of identity.

Appeal against conviction and sentence, by leave of the full Court, granted on November 15th, 1915. The appellant was convicted on October 19th, 1915, before the Chairman of the Surrey Sessions, holden at Kingston, of larceny, and was sentenced to eighteen months' imprisonment with hard labour.

Fox-Davies for the appellant, who was present. The appellant was indicted with one Buol, who does not now appeal [but see p. 305, below], of breaking and entering the shop of one Edwin Knight, and stealing therein a "Triumph" motor-cycle and side-car, and a "Douglas" motor-cycle. There was no evidence either of breaking and entering, or of stealing. The prosecutor alleged that the offence was committed on July 19th, 1915, and that on August 4th the appellant and his fellow-prisoner were arrested at Sutton with a "Douglas" cycle and side-car in their possession. At the trial the appellant gave evidence on his own behalf. He denied stealing either of the cycles, but said that he had bought the "Douglas" which was in his possession on July 1st from a Mr. Winkles, and produced a receipt for the payment of the purchase price. That was substantially his defence. There was no evidence whatever against him of the theft of the "Triumph" cycle, and the Chairman quite plainly directed the jury to that effect. The Chairman, however, never placed the case for the defence fairly before the jury—that of the identity of the motor-

1915
22 *November.*

LOUIS BRUHIN.

Reading
L.C.J.
Bailhache J.
Shearman J.

cycle—and on that ground the conviction should be quashed. [He was stopped.]

Van Breda for the Crown. Even if there was no full direction to the jury in regard to the defence, the evidence was so clear that the appellant either had stolen the cycle or had been found in possession of it in suspicious circumstances that there was no substantial miscarriage of justice in the conviction and sentence with which the case concluded.

The LORD CHIEF JUSTICE: In this case the first thing to be observed is that, although the appellant and his fellow-prisoner were indicted for the stealing of *two* motor-cycles—a "Triumph" and a "Douglas"—and the Chairman was of opinion, and directed the jury on three separate occasions, that there was no evidence upon which they could be convicted of stealing the "Triumph" cycle, the jury were unable to agree to acquit the prisoners, and were discharged without giving a verdict on that part of the case. With regard to the "Douglas" motor-cycle, the defence set up was that the cycle which was found in the possession of the appellant on August 4th was not that which was stolen on July 19th, but one which he had himself purchased on July 1st. In support he produced what purported to be a receipt for the payment of the purchase-money. Unfortunately, the Chairman, in his summing up, did not put this defence clearly to the jury. He referred to it, and then wandered away and dealt with the case as if the issue for trial was whether the appellant had given a satisfactory explanation of being in possession of stolen property, whereas the defence was that the "Douglas" cycle was not stolen property, but was purchased on July 1st. We are told that, despite this, we ought to support the verdict of the jury, since the facts clearly establish that the appellant either had stolen the cycle or was unlawfully in possession of it. But we cannot come to the conclusion that that was established by the evidence. There was some evidence to support such a view, but none sufficiently clear to enable us to say that, even with a proper direction, the jury would have come to a conclusion adverse to the appellant. In this connection it is well to observe that the same witnesses who had identified the "Triumph" cycle identified the "Douglas" cycle also. We cannot say that this conviction ought

1915
22 *November.*
LOUIS BRUHIN.
Reading L.C.J.

to stand, notwithstanding that the summing up is unsatisfactory, and the result is that it must be quashed.

Conviction quashed.

Solicitor for the Appellant—*A. Ross Dagg.*

G.F.L.B.

EVI MORRISON ALIAS RADFORD ALIAS RICHARDS.

Severity of sentence after previous convictions.

Appeal against sentence by leave of Bray J. The appellant was convicted on October 22nd, 1915, before the Deputy-Chairman of the West Kent Sessions, holden at Maidstone, of obtaining food and money by false pretences, and of obtaining credit by fraud, and was sentenced to three years' penal servitude and one day's imprisonment, the sentences to be concurrent.

The appellant, a girl of twenty-six years of age, was charged on two indictments. The first indictment charged her with unlawfully obtaining by false pretences a quantity of food of the value of 30*s.* and the sum of 16*s.* in money, from one Martin, with intent to cheat and defraud. The second indictment by the first count charged her with obtaining credit from a firm named Robins and Day, Ltd., to the amount of £18 17*s.* 3*d.*, by means of fraud other than false pretences. The second and third counts contained similar charges in respect of credit from other firms to the amounts of £5 19*s.* 3*d.* and 15*s.* 6*d.* The credit was obtained in connection with the hire of motor-cars and the purchase of jewellery and clothing. To these charges the appellant pleaded "not guilty," but the jury found her guilty on all. She consented to the Court dealing with certain other offences standing against her, and was sentenced to three years' penal servitude on the first indictment and one day's imprisonment on the second, the sentences to be concurrent. Evidence was given that the appellant had been previously convicted on seven occasions of stealing and

1915
22 *November*.

EVI MORRISON
ALIAS
RADFORD
ALIAS
RICHARDS.

Reading
L.C.J.
Bailhache J.
Shearman J.

obtaining money, &c. by false pretences, sometimes under the names of Radford or Richards, and had received sentences varying from six weeks' imprisonment to three months' and three months' consecutive with hard labour.

The appellant in person.

R. F. Gibson, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: In this case the Deputy-Chairman came to the conclusion that, in view of the offences of which the appellant had been convicted by the jury, and of her record, it was no use sentencing her to any short term of imprisonment, but that a term of penal servitude would act more for her benefit. It is always very difficult in cases of this character to determine the kind and length of sentence which is most beneficial, but in our view, in this particular case, a term of three years' penal servitude was too severe. We feel that we must take into account the ease with which credit was obtained by this young woman, and the temptation which in consequence was placed before her of continuing her evil practices after she had once started them, although that, of course, is no excuse. We think that the proper sentence in this case would be one of nine months' imprisonment without hard labour, and the sentence will be reduced accordingly.

Sentence reduced.

G. F. L. B.

1915
22 *November.*

Reading
L.C.J.
Bailhache J.
Shearman J.

ARTHUR SAMUEL FREEMAN, LUDWIG KAHN, DANIEL BRAY, SAMUEL BRAY.

The Court will in its discretion grant leave to appeal when it has primâ facie *reason to believe that an incriminating statement by a co-defendant has been admitted prejudicially to the applicant.*

Applications for leave to appeal against conviction and sentence.

The applicants were convicted on October 28th, 1915, at the Liverpool Assizes, before Ridley J., of conspiracy and attempt to obtain money by false pretences, and were sentenced to two years' imprisonment, with the exception of Samuel Bray, who was sentenced to six months' imprisonment.

J. D. Cassels for the applicants Daniel Bray and Samuel Bray. The applicants Freeman and Kahn are not represented by counsel. The false pretences were alleged to have been made upon a Mr. Walters. living at Liverpool, who was interested in fruitarianism, vegetarianism, and the establishment of universal peace. In the early part of 1915 the applicant Kahn, who pretended to be an Indian prince with occult powers, got into contact with this gentleman through the applicant Freeman. On July 12th he told him that he was building a "temple" in which to "preach" fruitarianism, vegetarianism, and peace doctrines, that he had influence with King George V., the Emperor of Germany, and the President of the United States, by which he hoped to bring the war between England and Germany to an end, and that he required money for these purposes. These representations were totally untrue. As a result Walters gave to the applicant, Daniel Bray, the sum of £500, to be applied for the purposes mentioned. The convictions of the applicants, Daniel and Samuel Bray, should be quashed. The judge misdirected the jury when summing up the case in not telling them that a certain incriminating statement made by Kahn was evidence against Kahn, but not against the other prisoners. This was a misdirection which went to the root of the issues before the jury, and the applicants should be given relief. Should, however, the Court take an opposite view, the sentences of the applicants should be reduced. That of Daniel Bray is obviously excessive, since he, though a

1915
22 *November.*

ARTHUR SAMUEL FREEMAN, LUDWIG KAHN, DANIEL BRAY, SAMUEL BRAY.

Reading L.C.J.
Bailhache J.
Shearman J.

man of good character, received the same sentence as Kahn, whose record was shewn to be bad.

SHEARMAN J.: The Court is of opinion that the appeal of Kahn is entirely frivolous, and that those of Freeman and Daniel Bray must also be dismissed. We think, however, that the case of Samuel Bray is one which is entitled to more full discussion, and we therefore give this applicant leave to appeal against his conviction.

Applications of Kahn, Freeman, and Daniel Bray dismissed; Application of Samuel Bray allowed in respect of conviction only. [See p. 290, below.]

Solicitors for the Applicants, D. and S. Bray—*H. Pfahl & Co.*

G. F. L. B.

ANON.

When the defence has been put to the jury the Court does not readily entertain an objection that the direction was insufficient.

The applicant was convicted, at the Central Criminal Court, on October 22nd, 1915, before Mr. Justice Darling, Mr. Justice Avory, and Mr. Justice Rowlatt, of having attempted to communicate information with respect to the movement, description, numbers and disposition of His Majesty's Forces to the enemy, in contravention of the Defence of the Realm Acts and the Regulations thereunder, and was sentenced to penal servitude for life. At a former trial the jury disagreed. The trials and this application were heard *in camera*.

St. John Hutchinson for the applicant, who was present (under s. 10 of the Criminal Appeal Act, 1907). The applicant is a British subject, and was charged with having attempted to communicate to the enemy information concerning the disposition of His Majesty's Forces by sending a message written in invisible ink to a German agent in Norway. The date on which the offence

1915
22 *November.*

ANON.

Reading
L.C.J.
Bailhache J.
Shearman J.

was alleged to have been committed was July 23rd. It was further said that on July 9th he sent to the same addressee a demand for money also written in invisible ink. The defence set up at the trials was that he had, while in Germany, suffered ill-usage at the hands of the German authorities, and had thought that he might best revenge himself on the German Government by coming to this country, posing as a spy, and obtaining payment for information which was inaccurate and useless. That defence was borne out by the evidence. His conduct while in England was absolutely without suspicion: indeed, a witness was called who testified that she had lived with the applicant for some time past and could account for the whole of his time. The prosecution did not prove any occasion upon which the applicant attempted to elicit information from soldiers or other persons. The authorities first became suspicious of the applicant when the communication of July 9th came into their hands; yet between that date and the apprehension of the message of the 23rd they could produce no evidence that he had made any suspicious enquiries. The whole case for the prosecution rested on the communication of July 23rd. That communication contained statements which were true, but also teemed with those that were false. The judge when summing up the case to the jury did not put forward the case for the defence sufficiently fully. In these cases there is bound to be in the minds of the jury a certain degree of prejudice against the prisoner, and for that reason the judge should even elaborate the defence. The existence of true statements in the message of July 23rd was explained as being pure coincidence. The judge, Darling J., pointed out to the jury that such a coincidence would be extraordinary, but he failed to point out that, on the other hand, if the appellant had really attempted to obtain information which would be of value to the German Government the extent of the inaccuracies in the message was extraordinary. The case was one of extreme doubt, and the applicant was entitled to have the case put not only fairly, but strongly and favourably by the judge in his summing up.

The Attorney-General (Sir F. E. Smith, K.C.), Bodkin, Branson, and Cecil Whiteley, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: The complaint made by counsel

1915
22 *November.*

ANON.

Reading L.C.J.

for the applicant is not that there was misdirection of the jury by the judge at the trial, but that there was not sufficient direction on the defence set up by the applicant. We have said again and again in this Court that this in itself is not sufficient to justify any interference with a verdict if the direction is otherwise a proper one and no complaint can be made of any of the observations of the judge. If, of course, the judge in directing the jury had omitted to notice the defence and misled the jury into the belief that there was no defence it would be a totally different thing. There is no such suggestion here. The substantial case for the defence was that, although certain of the facts which the applicant attempted to communicate to the German agent in Norway in the letter of July 23rd were true, or approximately so, yet that was a pure coincidence, the contents of the letter being all pure invention on the part of the applicant. There certainly were statements in the letter which might be said to be absolutely untrue, but the critical statements concerning the movements of certain forces and the position of certain munition factories were very close indeed to the truth. The case centred round these statements, and the prosecution contended that owing to the accuracy of their detail they could not have been merely invented by the applicant. If the applicant's story was true, there must have been a very remarkable coincidence, and it must also be borne in mind that some of the statements made concerned what was occurring in the very neighbourhood in which he was living. The judge pointed out to the jury the defence that was raised, and not only that, but dwelt upon it, explained it, and cautioned the jury. It was an unimpeachable direction in law. That he did not deal with every possible fact which might be said to be available to the defence in explanation of the acts of the applicant is no ground for saying that the direction was wrong or that the judge did not properly direct the jury. For these reasons, the Court is of opinion that there is no ground upon which leave to appeal can be granted.

Application dismissed.

G. F. L. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE, AND MR. JUSTICE AVORY.

1915
29 *November.*

ANNIE TONKS.

When a plea of autrefois convict *might have been pleaded at the trial but was not, the Court will (generally,* semble) *allow it to be set up on appeal.*

On the true construction of s. 12 (4) *of* 8 *Edw.* 7, *c.* 67, *the Children Act,* 1908, *a jury is not entitled to find a verdict of guilty of a lesser offence within sub-s.* 1 *of that section, if it is satisfied that the defendant is guilty of manslaughter.*

Therefore, after a summary conviction under sub-s. 1 *before the death of the child, an indictment for manslaughter in respect of its subsequent death is good.*

Appeal against conviction, on the certificate of the trial judge.

The appellant was convicted, on November 9th, 1915, before Bailhache J., at the Stafford Assizes, of manslaughter, and was sentenced to five months' imprisonment with hard labour, consecutive to a sentence of four months' imprisonment with hard labour which she was then undergoing.

Sherwood for the appellant, who was not present (under s. 10 of the Criminal Appeal Act). On September 27th, 1915, the appellant and her husband were summoned before the Walsall Borough Justices on a charge under s. 12 of the Children Act, 1908, namely, of wilfully neglecting their children in a manner likely to cause them unnecessary suffering or injury to their health. They were convicted and sentenced to terms of four and three months' imprisonment with hard labour respectively. On October 1st, while they were serving these sentences, their son James, a child of six years old, one of the children in respect of whom his parents had been charged, died, and according to the evidence his death was accelerated by the neglect which he had suffered. The appellant and her husband were thereupon indicted for the manslaughter of this child, the appellant being convicted

1915
29 *November.*

ANNIE TONKS.

Reading
L.C.J.
Lord
Coleridge J.
Avory J.

and sentenced to five months' imprisonment with hard labour, consecutive to the sentence she was already serving. She was not defended. Her husband was acquitted. It is submitted that the conviction of the appellant is bad. Sect. 12 (4) of 8 Edw. 7, c. 67, the Children Act, 1908, provides that "Upon the trial of any person over the age of sixteen indicted for the manslaughter of a child or young person of whom he had the custody, charge, or care, it shall be lawful for the jury, if they are satisfied that the accused is guilty of an offence under this section [see sub-s. 1] in respect of such child or young person, to find the accused guilty of such offence." The appellant could have been convicted at the Assizes of "an offence under this section," viz., of the wilful neglect of the child James. She was, therefore, put in peril twice for the same offence. The fact that on the second occasion she was indicted for a graver charge does not affect this.

He referred to *Morris* (1867), L. R. 1 C. C. R. 90; 36 L. J. M. C. 84; 10 Cox C. C. 480; *Miles* (1890), 24 Q. B. D. 423; 59 L. J. M. C. 56; *Friel* (1890), 17 Cox C. C. 325; and *Barron*, [1914] 2 K. B. 570; 83 L. J. K. B. 786; 78 J. P. 311; 58 S. J. 557; 10 Cr. App. R. 81.

These authorities are not inconsistent with the submission which has been made. They all depend upon the fact that on an indictment for murder or manslaughter a conviction for assault is not possible, and therefore the accused persons were not twice put in peril of a conviction for assault.

He also referred to *Vandercomb* (1796), 2 East P. C. 519; 2 Leach, 708; *Clark* (1820), 1 B. & B. 473; Archbold (24th ed.), p. 177; and Stephen's Digest of the Law of Criminal Procedure (1883), p. 174; and sub-s. 3 of s. 12 of the Children Act, 1908.

[LORD COLERIDGE J. referred to *Norton* (1910), 5 Cr. App. R. 65; 26 T. L. R. 550.]

D. Cotes-Preedy, for the Crown, was not called upon to argue.

The LORD CHIEF JUSTICE: Counsel for the appellant has contended that we must regard this case as if a plea of *autrefois con-*

1915
29 *November.*

ANNIE TONKS.

Reading L.C.J.

vict had been properly entered at the trial, and as if the judge had wrongfully ruled as a matter of law that there was no case to go to the jury upon the point. We think that that view is right. No technicality should prevent this Court from administering justice. The Criminal Appeal Act, 1907, is clear upon that point.

On the main issues raised by this appeal the argument addressed to us is that by virtue of the provisions of the Children Act, 1908, s. 12 (4), it is open to a jury, at the trial of a person over sixteen years of age for the manslaughter of a child of whom that person had the custody, charge, or care, to find the accused guilty of (*inter alia*) the wilful neglect of that child although they do not find him guilty of manslaughter. That is to say, that when a person is charged with manslaughter under this statute the jury are not bound upon the facts to return a verdict either of guilty of manslaughter or of acquittal, but that it is open to them to find that the accused has been guilty of wilful neglect of the child although he had been indicted for manslaughter. But, says Mr. Sherwood, the section must be read as meaning that the jury can find a verdict of the lesser offence although they consider on the facts that the accused is guilty of manslaughter. We cannot think that that is the meaning of the section, or that that is giving a natural or reasonable interpretation to its language. In our view this sub-section was passed to enable a jury upon an indictment for the manslaughter of a child to find a verdict of wilful neglect if they thought that the facts warranted a conviction for this offence but did not warrant one for manslaughter, notwithstanding that the only crime for which the prisoner stood indicted was that of manslaughter. Without this section this would not have been possible. Mr. Sherwood refers us also to sub-s. 3 of s. 12, but that does not assist his case. Sub-s. 3 simply means that a person may be charged with committing an offence under s. 12, notwithstanding the death of a child in respect of whom the offence is alleged to have been committed. That is all the sub-section says. A case might arise in which a child might not die actually in consequence of, let us say, neglect, but nevertheless where neglect might have been present. There is, therefore, no difficulty arising out of the provisions of the Children Act, 1908, in applying the well-known principle of our common law, to which our attention has been called, namely, that a person

shall not be put in peril twice for the same offence. It is urged that the appellant has been convicted for an offence for which she had already been convicted. But that argument ignores the most important fact of the death of the child which occurred some days after the first conviction. At the trial of the first offence, whether under the Summary Jurisdiction Acts or on indictment, it would have been impossible to have charged the appellant with manslaughter because death had not then occurred. When death did occur and the indictment for manslaughter was preferred no difficulty really arose. Proper effect can be given to the provisions of sub-s. 4 of s. 12 by the judge telling the jury that in the case before them they must come to a conclusion either that the accused is guilty of manslaughter or is not guilty. He did not do in this case what he would have done in a normal case under this section, namely, have pointed out to the jury that it was open to them if they thought right to find the prisoner guilty only of the lesser offence, because of the special facts of the case. In our view it is wrong to say that a person indicted for the manslaughter of a child whose death has occurred after the conviction of the same person for the wilful neglect of that child can be said to be twice put upon his trial for the same offence. We desire to call attention to a passage on p. 177 of the twenty-fourth edition (1910) of Archbold's Criminal Practice, which is in these terms:—

"The true test by which the question, whether such a plea [*autrefois acquit*] is a sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first."

The authority quoted in support of that proposition is *Clark* [above]. But on examination it will be found that that case is no authority for the principle enunciated in the text-book. This book, which is usually entirely accurate and is evidence of so much painstaking skill and industry, is, I fear, in error on this occasion. We were also referred to a passage on p. 174 of Stephen's Digest of Criminal Procedure, which says: "A. pleads autrefoits convict or acquit to an indictment for the murder of B., and proves a previous conviction or acquittal for the manslaughter of B. or for the concealment of the birth of B. The plea is proved." It must not be taken that we assent to that as an illustration with regard to the concealment of birth.

1915
29 *November.*

ANNIE TONKS.

Reading L.C.J.

The whole point in this case turns upon the interpretation of s. 12 (4) of the Act of 1908, and it follows from our view of that that this appeal fails and must be dismissed.

Appeal dismissed.

G. F. L. B.

JOHN MATTHEWS, CHARLES ALBERT BURGWIN, FREDERICK ERNEST BURGWIN, WILLIAM HENRY BURGWIN.

Severity of sentence mitigated in view of good character.

Appeals against sentence.

The appellants were convicted, on October 20th, 1915, before the Chairman at the Glamorgan County Sessions, of assault occasioning actual bodily harm, and were each sentenced to eighteen months' imprisonment with hard labour.

C. Herbert Smith for the appellant, John Matthews, who was present. The appellant, Matthews, was found guilty with the other appellants of assaulting one McCarthy so as to occasion him actual bodily harm. The jury added a rider to the effect that the offence was committed under great provocation. At about ten o'clock at night on June 19th, 1915, this appellant met the prosecutor and another man. The prosecutor was under the influence of drink. There was an altercation in the course of which Matthews either fell or was knocked down. The prosecutor then proceeded on his way with his friend. He seemed a very unpopular man in the district, and on arriving at the top of the street became involved in a quarrel with the other appellants. He was knocked down and one of his legs was broken in two places. This struggle had been in progress some time before Matthews arrived. When he did come up and found that it was the prosecutor who was lying on the ground, it is admitted that he kicked him while in that position. It is submitted on these facts that the sentence passed on Matthews is too severe. There was surely a difference between his guilt and that of his fellow delinquents, since he was not present when the attack on the prosecutor was begun and only

1915
29 *November*.

JOHN MATTHEWS, CHARLES ALBERT BURGWIN, FREDERICK ERNEST BURGWIN, WILLIAM HENRY BURGWIN.

Reading L.C.J.
Lord Coleridge J.
Avory J.

assaulted him when suffering from a sense of indignation at the result of his first interview.

Charles Albert Burgwin in person. I had no grievance against the prosecutor. My two brothers and I said good-night to him. He swore at us and asked us what we wanted. He then made an unprovoked attack upon my brother, the appellant Frederick Ernest Burgwin. Matthews was not there at all.

Frederick Ernest Burgwin and *William Henry Burgwin* made similar statements.

Comyns Carr, for the Crown, was not called on.

The three Burgwins had after their offence and before their convictions enlisted in the 23rd Service Battalion of the Welsh Pioneers. Their Commanding Officer now attended the Court and said: I have investigated the characters of these three men. There is, as far as I can find, nothing against them during the last ten years. I am prepared to become guarantor, if these men are released, for their good behaviour for as long as the Court thinks fit.

LORD COLERIDGE J.: The offences of which these appellants were convicted were of the gravest character, and had there been no rider by the jury this Court would doubtless have thought that the sentences which were passed on them were quite proper and in no way excessive. On the other hand, they are young men without any bad record against them. They have enlisted the sympathies of the Commanding Officer of the regiment which they joined subsequently to the commission of their offence. He has been here to assist us in arriving at a right conclusion, for which the Court is grateful to him. In view of the circumstances I have mentioned, the Court will reduce the sentences of the appellants to twelve months' imprisonment with hard labour in each case.

Sentences reduced.

Solicitors for Appellant, John Matthews—*Wrentmore and Son*, for *Spickett and Sons*, Bargoed.

G. F. L. B.

1915
29 *November.*

Reading
L.C.J.
Lord
Coleridge J.
Avory J.

SAMUEL BRAY (*a*).

The Court will, if it thinks it necessary, deal with and act upon evidence disregarded by the judge at the trial.

Cassels: On July 14th the appellant, who had remained in London, was found to be in possession of eight of the ten £50 notes for which Walters's cheque had been cashed. That was his only association with the crime. There was no evidence of knowledge on his part how the money had been obtained, although, on the other hand, it is admitted that no explanation was given how it came into his possession. It is submitted on these facts that there was no evidence against the appellant to go to the jury.

The Court drew attention to a telegram which had been put in at the trial. It was sent from London on July 13, to "Sam Black, Midland Hotel, Liverpool," and was in these terms: "Who should be sender of money? Wire name.—Sam."

This telegram was unexplained at the trial. It was sent by the appellant in answer to a telegram to him from Daniel Bray, asking for money.

The next point submitted on behalf of the appellant is this. Kahn, when under arrest, made a statement to a detective officer, and in that statement there were references to the appellant which tended to incriminate him. That statement was put in at the trial. Counsel for the defence pointed out that it was no evidence against the appellant, and counsel for the prosecution and the judge agreed. The judge warned the jury to the same effect in his summing up. At the close of the summing up the jury requested that the statement should be handed to them. In complying the judge did not expressly direct that it afforded no evidence against the appellant. On this ground, also, the appellant is entitled to have his conviction quashed. It must, moreover, be borne in mind that the judge in his summing up clearly invited the jury to acquit the appellant.

E. J. Purchase, for the Crown, was not called upon.

(*a*) See p. 281, above.

1915
29 *November.*

SAMUEL BRAY.

Reading L.C.J.

The LORD CHIEF JUSTICE: Counsel for the appellant has taken two points. First, that there was no evidence to go to the jury of the guilt of the appellant. Evidence was given at the trial that on July 14th £400 out of the £500 which had been obtained from Walters was found in his possession. The appellant affords no explanation of how that came about. In itself, of course, that is not conclusive evidence against him, but it cannot be said to be no evidence, and that, therefore, the case should have been withdrawn from the jury. The direction by the judge of the jury on this point was unimpeachable, and no complaint is, or could be, made of it. But in addition there is the fact of the telegram of July 13th, which was, seemingly, unexplained at the trial, and which shews that the appellant was, at any rate, in communication with Daniel Bray before July 14th, and telegraphing to him in a false name. The judge, in his direction to the jury on this point, was unduly favourable to the appellant, since he omitted all mention of this incident, which in our view is an important feature in the case. It is impossible to say that there was no evidence fit to be submitted to the jury.

Counsel then contended that the judge failed to direct the jury with sufficient clearness that the statement made by Kahn when under arrest was not evidence against the appellant. When the statement was put in at the trial this point was at once taken by counsel for the appellant, and was assented to by counsel for the prosecution and the judge. No doubt, too, counsel dwelt upon the matter in his address to the jury. At the close of the summing up the jury asked for the statement of Kahn to be handed to them. It must be remembered that they were trying four prisoners, and that the statement of Kahn was evidence against him. The complaint made is not that the statement ought not to have been handed to the jury, but that when doing so the judge should have directed them that it was not evidence against the appellant. But that direction had already been given earlier in the summing up. For these reasons the appeal fails, and must be dismissed.

Appeal dismissed.

G. F. L. B.

Solicitors for the Appellant—*H. Pfahl & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SCRUTTON, AND MR. JUSTICE LOW.

1915
6 *December.*

CHARLES HENRY OWEN.

Severity of sentence, after previous convictions.

Appeal against sentence. The appellant, who was present, was convicted of burglary, at the Quarter Sessions at Stoke-on-Trent, on October 26th, before the Recorder, and sentenced to three years' penal servitude. The appellant had stated the grounds of his appeal in writing.

The LORD CHIEF JUSTICE: This is an appeal against sentence. The appellant, who is only 21 years of age, had lived with his mother and aunt in Hanley. A few days after he had left his mother's house, the house was broken into and the money taken from the gas meter, the property of the British Gas Light Company. In his defence at the trial the appellant made grave charges against his aunt, which it is clear from the evidence had not a word of truth in them. The record of this man is undoubtedly bad; he has been convicted five times, but has never been sentenced to ordinary imprisonment. The sentence under the Borstal system has been of no effect. Viewing the whole case, however, the sentence appears to be too severe, and we reduce it to twelve months' imprisonment with hard labour.

Sentence reduced.

F. H. B.

LEE KUN.

1915
6 *December.*

Reading
L.C.J.
Scrutton J.
Low J.

Murder.

When a defendant ignorant of or insufficiently acquainted with the English language is represented on his trial by counsel, the general rule is that the evidence must be interpreted to him, unless he personally or by his counsel dispenses with a translation. Such dispensation is in every case at the discretion of the judge, who must always be satisfied (including the case of deaf and dumb defendants fit to plead) that defendant substantially understands the evidence and the case made against him.

Proviso to s. 4 (1) of the Criminal Appeal Act applied.

When an appeal is to be supported on a ground not stated in the notice, it should be mentioned in counsel's opening.

This was an application for leave to appeal against conviction, and was heard as a final appeal. The appellant was convicted of wilful murder, at the Central Criminal Court, on 17th November, 1915, before Darling J., and was sentenced to death.

Tristram Beresford for the applicant, who was present. The appellant had formerly lived with the murdered woman, who was a prostitute. Apparently she left him and went to live with another man, and the appellant did not see her again until the night before the murder. On the 16th October the appellant called to see the deceased woman at a house in Limehouse, and went out with her into the back yard. They had not been there a minute when the woman screamed out "Oh, mother!" and the prisoner was found standing over her with a knife in his hand.

The grounds of the appeal were most important, and there had never been any direct English decision on the point. The question was whether a prisoner on trial for his life, who does not understand English, can be properly convicted when the evidence for the prosecution is not translated to him—as it was not in this case. The appellant only understands a few sentences in "pidgin" English, and when he was charged at the police station the charge and his reply were interpreted. All trials for felony must take place in the presence of the prisoner, except only when the prisoner by his conduct renders the carrying on of the trial in his presence impossible.

[The Lord Chief Justice: The point we have to consider is that the prisoner was defended by counsel, and no application was

1915
6 *December.*

LEE KUN.

Reading
L.C.J.
Scrutton J.
Low J.

made to have the evidence interpreted. The prisoner knew what was going on, and was called and gave his evidence, which was interpreted.]

I am quite confident that the fact that I was present and took no objection cannot affect the proposition at all. Counsel for the prisoner has no power to waive anything. The matter never occurred to me until the verdict was interpreted to the prisoner, and he said in Chinese, "Who is the witness?"

[The LORD CHIEF JUSTICE: I read that as meaning "who was the witness of the crime?"]

There are three reasons why the evidence should be interpreted:

(1) The prisoner has the right to make a statement to the jury, even when he is defended by counsel. How can he do this when he does not know what evidence has been given against him?

(2) Under the Criminal Evidence Act he is entitled to go into the witness-box and give his evidence, and unless he knows what the evidence against him is, it would be impossible for him to rebut it.

(3) Unless the evidence is translated he cannot assist his counsel with the cross-examination.

[The LORD CHIEF JUSTICE: Do you say that the conviction should be quashed, or that there should be a new trial?]

This is such an irregularity as will lead the Court to quash the conviction. Neither the prisoner or his counsel can consent to anything on the trial of a felony. *Bertrand*, P. C. 1 L. R. 520; 4 Moore P. C. (N. S.) 460; 36 L. J. P. C. 51; 16 L. T. 752; 16 W. R. 9; 10 Cox C. C. 618 (1867); *Moore and another*, 61 L. J. M. C. 80; 66 L. T. 125; 40 W. R. 304; 17 Cox C. C. 458; 56 J. P. 345; C. C. R. (1892). There are cases of misdemeanour where a prisoner can waive his rights. *Morphew*, 2 M. & S. 602 (1814); *James Streek*, 2 C. & P. 413 (1826). In the Hong Kong law reports these is a case absolutely on all-fours with the present case: *Kwok Leung and others*, 4 H. K. L. R. 161 (1909). In that case the evidence for the prosecution

1915
6 *December*.

LEE KUN.

Reading L.C.J.
Scrutton J.
Low J.

was given in a language which the prisoners did not understand, and it was not interpreted to them. The Court held that the conviction must be quashed, and that the fact that counsel had not objected was wholly immaterial. All the prisoners were called as witnesses.

[The LORD CHIEF JUSTICE: In that colony is there any provision such as in s. 4, sub-s (1) of the Criminal Appeal Act?]

I should say probably not.

Another point is that the prisoner's right of challenge to the jury was never properly interpreted to him. On this point leave is asked to call as a witness a Chinese gentleman who was present at the trial and heard what the interpreter said to the prisoner.

[The LORD CHIEF JUSTICE: Where an appeal is to be supported on grounds that have not been stated in the notice of appeal this should be mentioned in counsel's opening.

Assuming the right of challenge was not properly interpreted to prisoner, what might have happened if it had been properly interpreted ?]

If the right of challenge was not interpreted to the prisoner, this would be such a grave irregularity as to vitiate the trial, and it is not for the Court to speculate and say no substantial miscarriage of justice has been caused.

[The LORD CHIEF JUSTICE: The Court will not allow this evidence to be called.]

The third point is that when the prisoner was found guilty the usual charge was never interpreted to him until sentence had been passed.

[The LORD CHIEF JUSTICE: I gather from the shorthand note that the learned judge became aware of this, and called back the prisoner, had the charge interpreted to him, and sentenced him again.]

The last point is on misdirection to the jury. The prisoner

1915
6 *December.*

LEE KUN.

Reading L.C.J. Scrutton J. Low J.

in his evidence had said positively that he did not want to take the woman back. The judge in his summing up puts it as if the prisoner still loved the woman and was urging her to come back.

The Court called on counsel for the Crown on the first point only in respect of its application as a general principle, and with regard to the rules it ought to lay down.

Bodkin (*Boyd* with him) for the Crown. Having regard to what appears on the shorthand notes, the Court cannot say that the appellant was a man who did not understand English, and could not understand the trial. He was represented at the police-court by my learned friend, a solicitor and an interpreter, and by the same representatives at the trial. Everything was translated to the prisoner at the police-court, and with the exception of the prisoner's evidence, the depositions were not departed from at the trial. In the interval between the committal and the trial the prisoner would prepare his statement of his defence, and that would be in his counsel's hands. The practice at the Central Criminal Court on the trial of a foreigner who does not speak English and is not defended by counsel is to have the evidence interpreted to him. If the prisoner speaks our language fairly well he is asked if he desires to have the evidence interpreted, as he is able to judge from the police-court proceedings whether he can follow the proceedings at the trial. When the prisoner is defended by counsel it is left to his counsel to say whether he desires the evidence to be interpreted or not, for presumably his counsel comes into court knowing what the defence will be. The prisoner is there represented by his counsel, who alone may take part in the proceedings.

There are three different propositions to be considered. Proposition 1: If the prisoner is a foreigner who does not understand English, and is undefended, he has a right to have all the evidence translated to him.

[SCRUTTON J.: How if it is a long document?]

The effect of the document must be translated.

[The LORD CHIEF JUSTICE: I should have thought in strictness all the document.

Low J.. Why should not the opening be translated?

SCRUTTON J.: Or the speeches of counsel and the summing up?]

Not the speeches or the summing up, because it is on the evidence that the jury have sworn to give a verdict.

Proposition 2: When a foreign prisoner is undefended, and it is obvious that he can speak some English fairly well, then it is for the Court in the exercise of its discretion to ask the prisoner whether he understands the evidence, and tell him to ask for it to be interpreted if he does not.

Proposition 3: This is the case here. The prisoner is represented by counsel who is fully seised of the case by proper information and instructions, who was counsel and heard the evidence in a previous inquiry, when the prisoner had the evidence translated to him. The prisoner is identified with his counsel, and it is for counsel to say if he or the prisoner wants the evidence interpreted. This is not a matter of making any admission. The case of *Kwok Leung* appears to be founded on the transgression of a rule which the Chief Justice of the Colony laid down when he was first appointed. *Bertrand's* case was relied upon, but nearly all the remarks in *Bertrand's* case are *obiter*. That case was commented on in *Ex parte Bottomeley and others*, (1909) 2 K. B. 14; 78 L. J. K. B. 547; 100 L. T. 782; 73 J. P. 246; 25 T. L. R. 371; K. B. D.

[The LORD CHIEF JUSTICE: That was concerned with a hearing before a preliminary tribunal. I do not want it to be assumed that the Court would regard the irregularities in *Bertrand's* case as mere irregularities of which no notice would be taken.]

No objection to any irregularity was taken at the trial, and the Court will not allow them to be taken now. There was an interpreter sitting below the prisoner at the trial; the prisoner never made any objection, and went into the witness-box and gave his evidence.

Beresford in reply referred to the Indian Criminal Procedure Act, 1898, art. 360, sub-s. 3, and art. 361, sub-ss. 1 and 2.

1915
6 *December.*

LEE KUN.

Reading L.C.J.
Scrutton J.
Low J.

The LORD CHIEF JUSTICE: The Court has come to the conclusion that the application for leave to appeal which has been argued as an appeal must be refused. Reasons will be given at a later date.

Beresford: The execution is fixed for to-morrow, and the prisoner's friends desire to ask the Attorney-General for his *fiat* in order that the case may be carried further.

The LORD CHIEF JUSTICE: In any event nothing will take place until after we have given our reasons. (To an interpreter, who had been sworn): Translate this to the prisoner, "We have dismissed your appeal, and shall give you our reasons in a day or two. When we give our reasons you are entitled to be present, and will be brought to the Court."

F. H. B.

17 *December.*

The LORD CHIEF JUSTICE read the following judgment:—

The appellant, Lee Kun, a Chinese, was convicted of the murder of one Clara Thomas. He appeals to this Court to quash the conviction on the ground that, being a foreigner, and ignorant of the English language, he did not understand the evidence for the prosecution, which was not translated to him. Mr. Beresford, in an able argument, contended that, notwithstanding that the appellant was represented at the trial by counsel, and that no application was made for the translation of the evidence for the Crown, the omission to have the evidence translated constituted a grave irregularity in the proceedings, and that, in consequence, the conviction should be quashed.

The Court is of opinion, having regard to the facts and circumstances of this case, that the appeal must be dismissed, whether or not there has been irregularity, as contended, in the proceedings, on the ground that no substantial miscarriage of justice has actually occurred. (See s. 4 (1) of the Criminal Appeal Act, 1907.) If the evidence had been translated to the appellant the same verdict would inevitably have resulted. The issue was quite simple. The Crown's case was that the appellant inflicted the fatal wound on the deceased.

His Lordship dealt with the facts of the case, and continued: For the defence, the appellant gave evidence which was translated

1915
17 *December.*

LEE KUN.

Reading L.C.J.

by an interpreter. At the police-court proceedings the appellant was represented by solicitor and counsel, Mr. Beresford. All the evidence there given was translated to the appellant by an interpreter as and when it was written in the depositions. It is not suggested that the evidence given at the trial at the Central Criminal Court differed from that recorded in the depositions. Therefore the appellant and his counsel before the trial of the indictment knew the case that would be presented by the Crown and the evidence to be given in support of it. At the trial the appellant was represented by the same solicitor and counsel. At the outset of the proceedings the charge in the indictment was translated to the appellant, and he was called upon through the interpreter to plead and was informed of his right to challenge the jury. No request was made then or at any time during the trial by the appellant or his counsel for the assistance of the interpreter to translate the evidence for the Crown. Counsel has informed this Court that it never occurred to him to ask that the evidence should be translated. . . . After careful examination of the evidence and of the proceedings at the trial, and assuming there was irregularity as contended, this Court is satisfied that no substantial miscarriage of justice has actually occurred, and, therefore, in accordance with the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, the appeal should be dismissed.

Notwithstanding that we have arrived at this conclusion, we think it advisable to deal with the abstract question raised. When a foreigner is on trial on an indictment for a criminal offence, and he is ignorant of the English language and is undefended, the evidence given at the trial must be translated to him. If he states that he understands part of the evidence and does not wish that part translated it need not be translated, unless the judge in his discretion thinks otherwise, because the object of the translation is already achieved. For example, if an agreement in writing signed by the accused is put in evidence by the Crown, it might well be that the accused knew the contents and did not wish a translation. He is not thereby admitting any part of the case against him, but merely that he understands that part of the evidence. If he does not understand the English language he cannot waive compliance with the rule that the evidence must be translated; he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for

1915
17 *December.*

LEE KUN.

Reading
L.C.J.

the assistance of an interpreter. It is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes and do not forfeit life or liberty except when tried under the safeguards so carefully provided by the law. No trial for felony can be had except in the presence of the accused, unless he creates a disturbance preventing a continuance of the trial. (See Stephen's Digest of Criminal Procedure, p. 194, and *Rex* v. *Berry*, 104 L. T. J. 110, *per* Wills J.; 1897.) Even in a charge of misdemeanour there must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he may hear the case made against him, and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings. The prisoner may be unable, through insanity or deafness or dumbness, or the combination of both conditions, to understand the proceedings or to hear them, either directly or by reading a record of them, or to answer them either by speech or writing. In these cases a jury is sworn to ascertain whether the prisoner is "fit to plead," which is interpreted [by Alderson B.] in *R.* v. *Pritchard* (7 C. & P. 303; 1836) as meaning whether he is "of sufficient intellect to comprehend the course of the trial so as to make a proper defence . . . if you think there is no certain method of communicating the details of the trial to the prisoner so that he can clearly understand them and be able properly to make his defence to the charge you ought to find that he is not of sane mind." If the accused is found not fit to plead, he is not tried, but is detained during his Majesty's pleasure.

The authorities dealing with the matter are all discussed in the recent case of *Rex* v. *Governor of Stafford Prison, ex parte Emery*, (1909) 2 K. B. 81. If the accused is fit to plead it may

yet be that no communication can be made in the ordinary way; it may be that he is deaf and can only be approached by writing or signs, or dumb, and can only make his views known by writing or signs, or a foreigner who cannot speak English, and requires the assistance of an interpreter to understand the proceedings and make answer to them. In such cases the judge must see that proper means are taken to communicate to the accused the case made against him, and to enable him to make his answer to it. In the case of a foreigner ignorant of the English language who is undefended no difficulty has arisen in practice. The evidence is always translated to him by an interpreter.

The more difficult question arises when an accused foreigner, ignorant of the English language, is defended by counsel and no application is made to the court for the translation of the evidence. There is no rule of law to be found in the books on the subject, and as the result of inquiry which we have made since the argument, it has become clear that the practice of the courts in this respect has varied considerably during the last fifty years. It was stated at the bar by counsel for the Crown that the practice has been for the court not to require the translation of the evidence unless the accused or his counsel applied for it. There is no doubt that this practice has been followed by some judges; whereas other judges have inquired at the outset of the trial whether the accused or his counsel wished the translation to be made, and if the answer was in the negative they have permitted the trial to proceed without having the evidence interpreted to the accused.

Again, some judges have always insisted upon the translation, except when the accused or his counsel stated that he did not wish it, and other judges have required translation notwithstanding such a statement. The only practice in this respect upon which there has been uniformity is that, whenever any desire has been manifested by the accused or his counsel for the translation it has always been permitted.

We have come to the conclusion that the safer, and therefore the wiser, course, when the foreigner accused is defended by counsel, is that the evidence should be interpreted to him, except when he or counsel on his behalf expresses a wish to dispense with the translation, and the judge thinks fit to permit the omission; the judge should not permit it unless he is of opinion that by reason of what has passed before the trial, the accused substan-

1915
17 *December.*

LEE KUN.

Reading L.C.J.

tially understands the evidence to be given and the case to be made against him at the trial. 'To follow this practice may be inconvenient in some cases, and may cause some further expenditure of time; but such a procedure is more in consonance with that scrupulous care of the accused's interests which has distinguished the administration of justice in our criminal courts, and therefore it is better to adopt it. No injustice will be caused by permitting the exception above mentioned.

Speaking generally, police-court proceedings will have taken place and the evidence will there have been translated to the accused before he has to stand his trial on the indictment, so that at the trial he knows the case to be made against him. He can instruct his counsel upon it, and he may leave his defence in counsel's hands without having the evidence again translated to explain to him that which he already knows, and there seems no reasonable objection to such a course. If there should be a substantial departure from the evidence recorded in the depositions the judge would take care, even if counsel omitted to ask it, that the variation or addition should be translated to the accused, so that he might throw any further light upon the case.

The importance of the translation of any new or additional evidence cannot be doubted; such evidence may have a special significance to the accused and may enable him to recollect facts till then forgotten or to give additional information to his counsel for cross-examination. Further, he may wish to make a statement dealing with the evidence against him instead of himself giving evidence, and he should have all information for that purpose. Or, again, the variation from or addition to the evidence originally given at the police-court may have a bearing upon the sentence.

We think, therefore, that any substantial variation from the story originally told in the depositions or any additional evidence should be translated to the accused, even though he may be indifferent upon the matter or might not wish it. It is not suggested in this case that any additional evidence could have been given or any light thrown upon the case had the evidence which, in fact, followed the depositions, been again translated to the accused.

There is no authority in English law for the proposition that the omission to translate the evidence in the circumstances under consideration is an irregularity or is an irregularity which

1915
17 *December.*

LEE KUN.

Reading L.C.J.

vitiates the proceedings. It is, however, to be noted that in *R.* v. *Lyons and others* (known as "The Flowery Land" case), which was a prosecution for murder tried in 1864 before Baron Bramwell, the prisoners were foreigners who did not understand English, and were all represented by counsel. The prosecution was conducted by the Solicitor-General. The evidence was not interpreted, but upon the application of counsel for one of the prisoners the interpreter to the Spanish Consul was permitted to sit near them in order to communicate with the prisoners as the trial proceeded (59 C.C.C., Sessions Paper, 275).

That the practice was not uniform at that time is shown by another case tried on the same day in 1864, before Shee J. (*R.* v. *Boyden*, 59 C.C.C., Sessions Paper, 293). The accused, who was deaf and dumb, was represented by counsel, and the evidence was interpreted to him.

In 1872, Marguerite Dixblane, a Belgian who did not understand English and was defended by counsel, was tried before Mr. Baron Channell for murder. The evidence was interpreted to her (76 C.C.C., Sessions Paper, June 12, 1872, p. 103).

In 1876 several foreigners, who did not understand English and were defended by counsel, were tried before Brett J. for murder on the high seas. The evidence was not interpreted to the prisoners (*Cargalis, &c.*, 84 C.C.C., Sessions Paper, May 3, 1876, p. 37). In both of these cases the prosecution was conducted by the Law Officers.

There are other cases in which the course pursued before Baron Bramwell and Brett J. has been followed, and also others in which a different practice has prevailed.

Mr Beresford drew our attention to *Rex* v. *Kwok Leung and others*, (1909) Hong Kong L. R., p. 161, where a similar question was considered by the full Court, which is the equivalent of the Court for Crown Cases Reserved in that colony. That case is, of course, not binding upon us, but we have the advantage of the judgments of Chief Justice Piggott and Gompertz J., and have been impressed by their reasoning. We think, however, that the question whether there was an irregularity in the proceedings by reason of the omission to translate when the accused is defended by counsel is not a matter of law, but of practice, in our courts, and that practice is not settled.

In any event, we could not, as a matter of law, even apart from the considerations under s. 4 of the Criminal Appeal Act, 1907,

1915
17 *December.*

LEE KUN.

Reading L.C.J.

hold that an irregularity had been committed at the trial which would justify the quashing of the conviction. It is to be observed that there was no such power in the Hong Kong Court as is given to this Court by virtue of the proviso to the fourth section of the Criminal Appeal Act, 1907.

The result is that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the Applicant—*Ballantyne, Clifford and Hett.*

---

6 *December.*

COLIN ARCHIBALD MUNGO PARK; WILLIAM HILL.

When a hearing has been adjourned for the convenience of an appellant's counsel, the period of the interval will not be counted in the term of sentence.

These were applications on appeal from orders of Bray J., refusing leave to appeal against sentences. They were heard together. Park was convicted of forgery and false pretences, and Hill of false pretences, at the Liverpool Assizes, on 26th October, 1915, before Ridley J.; they were both sentenced to five years' penal servitude.

Maxwell appeared for Park, and *Lindon Riley* for Hill.

After the Court had refused the applications, *Maxwell* applied that the sentences should run from the date of conviction. These applications would have been heard a week ago, but were deferred for the convenience of counsel.

The LORD CHIEF JUSTICE: The Court refuses to allow the sentences to run from the date of conviction, but in this particular case will allow the one week for which the applications were deferred to count in the sentence. It must be understood that in the future no such relief will be granted.

Applications dismissed.

Solicitor for the Applicant Park—*Arthur Inman,* Liverpool.

Solicitor for the Applicant Hill—*Edward Lloyd,* Liverpool.

E. H. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE BAILHACHE.

HANS BUOL (*a*).

1915
13 *December.*

This was an appeal against conviction and sentence, by leave of Scrutton J. Appellant was convicted on the 19th October, 1915, at the Surrey Sessions, of larceny, and was sentenced to eighteen months' imprisonment with hard labour.

Wells-Thatcher for the appellant, who was present. The appellant was indicted with another man named Louis Bruhin for stealing two motor-bicycles; they were both convicted. Bruhin appealed successfully on the 22nd November; the Chairman had failed to put the real issue to the jury. Exactly the same criticism applies to the summing up as regards the present appellant. [He was stopped by the Court.]

Van Breda for the Crown. I could only repeat the arguments I put forward on the hearing of Bruhin's appeal. As they did not commend themselves to the Court on that occasion, I do not wish to repeat them.

The LORD CHIEF JUSTICE: This appellant was indicted with Louis Bruhin for shop-breaking and stealing two motor-bicycles and side-cars—a "Triumph" car and a "Douglas" car. The difficulty that arose in Bruhin's case is the same as that which meets us here. According to the defence put forward at the trial, Bruhin bought on the 1st July the "Douglas" car of which he was found in possession. The "Douglas" car which the prisoners were accused of stealing was stolen on the 19th July, so the defence

(*a*) See p. 276, above.

1915
13 *December.*

HANS BUOL.

Reading
L.C.J.

was that the car in Bruhin's possession was not the one which had been stolen. The Chairman directed the jury that there was no evidence that the prisoners stole the "Triumph' car, and as to the "Douglas" car, he left it to them to say whether a satisfactory explanation had been given of the possession by the prisoners of what he referred to as "stolen property." That is to say that he assumed that the "Douglas" car which was in Court was stolen property. The defence was that that car was not the one that had been stolen; the real defence was never put to the jury. For these reasons, and for the reasons which we gave in Bruhin's case, the conviction must be quashed.

Conviction quashed.

Solicitor for the Appellant—*A. Ross Dagg.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE AVORY.

HANS PAUL STUDER. 20 *December.*

There may be a "demand" "with menaces" within s. 45 *of* 24 & 25 *Vict. c.* 96, *the Larceny Act*, 1861, *though the language used is not explicit and the threat is veiled.*

Robinson (2 *Leach*, 749; 1796) *followed.*

This was an appeal against conviction on matters of law, and an application for leave to appeal against sentence. Appellant was convicted on the 1st November, 1915, at the Central Criminal Court, before the Common Serjeant, of demanding money with menaces, and was sentenced to three years' penal servitude.

Cecil Hayes for the appellant, who was present. The appellant was charged with demanding with menaces £250 from a man named Schutze. Schutze is a wholesale druggist in the City, a German by birth, who was naturalised in 1912, after living many years in this country. The appellant had been his manager for three years, and had admittedly invested £1,000 in the business. When the war broke out he told Schutze he had been approached by the police with reference to his own nationality, and had made it all right with the authorities. In August, 1914, Schutze was visited by detectives on the question of his nationality, and he also satisfied them. In May, 1915, he was troubled by some rioting after the *Lusitania* outrage, so that his mind had got into a worried state on this question. On the 25th May Schutze told the appellant that a detective had been to see him and had offered his help, saying that some of his employees had made complaints

1915
20 *December*.

HANS PAUL STUDER.

Reading
L.C.J.
Ridley J.
Avory J.

to Scotland Yard that he had been trading with the enemy; he asked the appellant, as he was so friendly with the police, to go to Scotland Yard and help him. After that the appellant told Schutze a lot of lies; he said he had been to Scotland Yard, which was untrue. Telegrams were received by Schutze on the 28th May, which according to the evidence were in the handwriting of the appellant's wife. One of them read, "Case serious. Will call during the day.—Woods." Woods was said by the appellant to be the detective who was assisting him in the matter, which was untrue. Another telegram was addressed to the appellant himself at the business premises; Schutze saw it lying on the appellant's desk and opened it; it read, "Thanks for kindness; am doing my best. Matters serious. Superiors sure to act at any moment. Advise immediate clearance.—Woods." On the 31st May, which was the day on which the offence was alleged in the indictment to have been committed, the appellant had an interview with Schutze. Schutze said, "What does Woods want to hand the papers back?" referring to certain invoices and papers which the appellant had falsely stated to be in the hands of the police. The appellant answered, "£250," Schutze said he would not pay that, and asked him to see whether he could do it for less. The appellant said, "Pay me £250, and I think I can settle it." There is no other evidence of a threat.

There are three necessary elements of the offence—a demand, a threat, and an intent to steal. The threat must be a threat to commit an act; see *Boyle and Merchant*, (1914) 3 K. B. 339; 83 L. J. K. B. 1801; 111 L. T. 638; 78 J. P. 390; 58 S. J. 673; 30 T. L. R. 521; 10 Cr. App. R. 180. There was no such threat in this case; there was no evidence of a threat to be left to the jury; for this reason I did not call the appellant to give evidence. No doubt the facts proved would have justified a conviction for attempting to obtain money by false pretences, but this was not the offence for which he was being tried. There was also no demand.

The common serjeant misdirected the jury as to the proper meaning of threat or menace; he assumed as a fact that Schutze was frightened by what was done, but this was one of the issues the jury had to decide. The only question left to them was who was the person who did blackmail Schutze; no opportunity was given to the jury to find that there was no threat, or that the acts

1915
20 *December.*

HANS PAUL STUDER.

Reading
L.C.J.
Ridley J.
Avory J.

of the appellant amounted to nothing more than false pretences. Further, no direction was given on the question of intent to steal. The appellant had lent Schutze £1,000 under an agreement by which he could only obtain repayment after giving twelve months' notice in writing; the defence on this point was that the appellant was only trying by improper means to obtain repayment of his own money. The common serjeant, however, told the jury that it would make no difference if money was to come to him at a future date.

[AVORY J.: *Robinson*, 2 Leach, 749; 2 East P. C. (1796), is authority that a request imposing conditions may come within the meaning of demand.]

The sentence was excessive, and one reason may be that it was suggested that the appellant was a German and not a Swiss, as he purported to be. There was nothing against his character of any kind before this.

W. Frampton for the Crown was not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted on indictment for demanding money with menaces with intent to steal, and was sentenced to three years' penal servitude. The case was tried before the common serjeant, and occcupied six days. As the common serjeant pointed out, it was not an ordinary case of blackmail. It appears that the prosecutor, who was of German birth, was naturalised and became a British subject two or three years before the war broke out. He was a manufacturer, trading in London, and the appellant was his confidential clerk and general manager, who had access to his business papers, and a certain control over his banking account. Before the war the prosecutor had carried on a considerable business with Germany and Austria. After the beginning of the war some question arose about the appellant's nationality, and he seems to have satisfied the authorities. A similar question arose about the prosecutor, and there was a conversation between him and the appellant which shewed that the latter had some knowledge of the police, and could bring influence to bear. At the end of 1914 a suggestion arose in a letter that the prosecutor was trading with the enemy.

1915
20 *December*.

HANS PAUL STUDER.

Reading L.C.J.

Nothing seems to have happened on that, but in May, 1915, the appellant discussed with the prosecutor the charges which he said had been made against the prosecutor at Scotland Yard. The suggestion was that Scotland Yard had been informed that Schutze, the prosecutor, had been trading with the enemy, and then Schutze suggested, as the result of the conversation in August, that the appellant should get some information on the matter. He was told to take the motor and go to Scotland Yard. The chauffeur proved that he never went there and, according to the evidence, there was no foundation for the suggestion that such a charge was pending.

It is unnecessary to go through the voluminous evidence, but it is apparent that telegrams were sent on the 28th May, not by the person whose name they bore, but fabrications by the appellant, and sent by him or on his instructions to Schutze. The object was to make Schutze pay £250, because the suggestion was that Woods, a supposed detective, would on receipt of £250 stop the proceedings. It is unnecessary to say that there was no shadow of foundation for this; there was no person named Woods who had authority to do any such thing. On those documents it was open to the jury to find that the appellant was asking for the money to settle with the detective in respect of the charge which, the appellant himself was pretending, existed, and doing it for the purpose of obtaining money. On the 31st May a telegram was received from the so-called Woods, sent to the appellant at the works of Schutze, and opened by the latter; it read, "Thanks for kindness; am doing my best. Matters serious. Superiors sure to act at any moment. Advise immediate clearance." Now in view of what had already happened, the said telegram meant as clearly as words can convey that unless the money was paid Woods's superiors would proceed with the prosecution, which would be a serious matter for Schutze. The prosecution say that this was a demand, accompanied by a menace with intent to steal. The defence say it is true that the statements were lies; no charge had been made against the prosecutor, and the telegrams had been concocted by, or with the knowledge of, the appellant, but the offence was only one of attempting to obtain money by false pretences, and he was not tried on any such indictment. Mr. Hayes has argued the case ably and forcibly, but the argument always comes back to this, that because on the facts he could have

1915
20 *December*.

HANS PAUL STUDER.

Reading L.C.J.

been convicted of attempting to obtain money by false pretences, he could not be convicted on the present charge.

The whole question is whether there is evidence on which the jury could find a verdict under the statute. That there was evidence of a demand seems clear enough, especially having regard to the case of *Robinson*. It is not necessary that the language should be explicit; it may be in language only a request. A mere request unaccompanied by any conditions would not constitute a demand under the statute, but there was ample evidence of a demand. Is there a menace? It is obvious from the argument that Mr. Hayes could not help admitting that what was done was done with the object of frightening Schutze, but he says that the fact that it was done with the object of frightening does not necessarily mean more than that it was a case of false pretences. It is clear that there was ample evidence on which the jury could find that the appellant's conduct amounted to a menace.

The next point taken is that there was no intent to steal. The argument on that is that in the first place the appellant parted with £1,000 to Schutze on terms that it should not be withdrawn without twelve months' notice. He was discharged shortly after the 31st May, and wanted the money back from Schutze to which he had no right until the necessary notice had been given. Then it is said that as they had parted, and as the bargain was rather a hard bargain, the appellant's only object was to get back the money that was owed to him. It is sufficient to say that there is not a tittle of evidence that that was the appellant's real object. There is no evidence that he made application for the money with the intent of repaying himself; the prosecutor denied it. One can easily see that it is not a defence which would commend itself to the jury.

The last point is that the common serjeant gave the jury no direction on the question of intent to steal. That is not quite right. During the argument it was suggested that this answer as to the £1,000 negatived the intent, and the common serjeant pointed out to the jury that it was not material to the case they were trying. Whether the money was owing in the future made no difference. In our view that was a proper direction. It is suggested that he might have left it to the jury to take a different view: the answer is that it is for the judge to say if there is no defence in law. The suggestion that there was misdirection on

1915
20 *December.*
HANS PAUL STUDER.
Reading
L.C.J.

the law has been dealt with by what we have already said. In our view the common serjeant tried the case with the greatest care, and took considerable pains to point out the salient facts to the jury, and he certainly did not take the case out of their hands.

With regard to the sentence, it was a very serious offence, and none the less serious because the appellant was acting as the manager and confidential servant of the prosecutor, a German who had only recently been naturalised. The courts are in the habit of punishing offences of this character seriously, and we think rightly. We cannot say that the sentence was too severe.

Appeal dismissed.

Solicitors for the Appellant—*Donnisthorpe & Co.*

A. L. B. T.

WILLIAM HENRY RYLE.

Sentence reduced in view of prisoner's state of health (which was not known to the judge at the trial).

This was an appeal against sentence, by leave of the full Court. Appellant was convicted on the 17th November, 1915, at the Manchester Assizes, before Low J., of forgery and fraudulent conversion as a trustee, and was sentenced to five years' penal servitude.

Du Parcq for the appellant, who was present. The appellant pleaded guilty to a series of offences as a trustee, and I do not contend that it was not a serious case, attended by certain circumstances of aggravation. But one point was not before the judge when he passed sentence, namely, that the appellant is suffering from diabetes; there is a medical certificate before the Court to that effect, and also a report from the prison doctor. The consequence is that, since this is a disease which must materially shorten life, he will have fewer years to live on his release from prison than a man of his age in normal health, and I submit that this is a circumstance which the Court might properly take into consideration.

1915
20 *December.*

WILLIAM HENRY RYLE.

Reading L.C.J.
Ridley J.
Avory J.

Roland Oliver for the Crown.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to forging the signature of his co-trustee, and to unlawful conversion to his own use of money which was in his possession as trustee, and he was sentenced to five years' penal servitude. Application was made for leave to appeal against that sentence, and on that occasion it was stated that it was desired to put evidence before the Court which was not submitted to the judge who passed sentence. It was a very serious case. True, he had not been convicted hitherto, and taking all the circumstances into account, and bearing in mind the further evidence which is before us, we think the justice of the case will be met by reducing the sentence to one of three years' penal servitude.

Sentence reduced.

Solicitors for the Appellant—*Pritchard, Englefield & Co.*, for *Boot and Dutton*, Manchester.

A. L. B. T.

INDEX.

ACCIDENT,
defence of, in murder, direction on, 136, 259.

ADJOURNMENT OF HEARING,
when not counted in sentence, 304.

ADMISSION,
words which may or may not be, not enough for a conviction, 195, 270.

ANSWER TO A CHARGE. *See* ADMISSION.

APPEAL
against conviction, leave to, must be formally asked, 1.
sentence. *See under* SENTENCE.
from verdict of "guilty but insane," none, 198.
ground of, not in notice, should be opened, 295.

APPELLANT
released on own recognisance, 223.

APPLICATION
to appeal granted on *primâ facie* ground, 280.

ARREST,
evading, not evidence of guilt, 75.

ASSISTING THE ENEMY,
appeal in, 207.

ASSOCIATION WITH THIEVES,
when to be alleged in statutory notice, 108.

ATTEMPT
to commit crime must be proved by acts not remotely connected, 124.
obtain by false pretences, how different from full offence, 113.

AUTREFOIS ACQUIT, CONVICT,
plea of, generally allowed to be set up on appeal, 284.

CARELESSNESS,
not "guilty knowledge," 2.

CASE STATED, 198.

CERTIFICATE,
appeals on, 63, 265, 272, 284.

CHILD,
unsworn, corroboration of, 272.

COMPANY,
promotion of, within Larceny Act, 1901, 215.

CONTROL,
test of receiving, 72.

CONVERSATION OF PRISONERS,
direction on, 265.

CONVICTION,
appeal against, leave for, must be formally asked for, 1.

CONVICTIONS QUASHED, 3, 4, 22, 23, 29, 42, 50, 57, 74, 75, 78, 80, 107, 110, 123, 130, 133, 142, 146, 183, 190, 197, 227, 244, 247, 255, 270, 275, 278, 306.
after fresh evidence, 142, 227.
as habitual criminal, 110.
but sentence unaltered, 146.
in murder, 142.
on point of law arising out of the facts, 130, 276, 306.
the ground of improper cross-examination, 251.
indictment being bad, 4.
insanity, 25.
misdirection, 3, 41, 50, 71, 75, 117, 142, 183, 190, 227.
mistrial, 22, 57, 80.
no evidence for jury, 133, 146.
non-direction, 243, 247, 272, 276, 306.
not sufficient evidence for jury, 195, 270. *See* ADMISSION.
previous conviction improperly disclosed, 104.
want of corroboration, 29, 272.

CO-PRISONER,
incriminating statement by, direction on, 243.
read to another, 269.
when not admissible, 265.

CORROBORATION,
if child not on oath, 272.
nature of, 28, 29.

COUNSEL
must open ground of appeal not in notice, 295.
not necessarily present for respondent in sentence cases, 241.

COURT
examines finger-prints, 90.
of trial calling evidence, 213.

"CREDIT"
within Bankruptcy, &c. Act, 1913, 85.

CROSS-EXAMINATION,
contents of inadmissible documents must not be suggested in, 13.
inadmissible question in, effect of, 166, 251.
within Criminal Evidence Act, 251.

DEAF DEFENDANT
must understand proceedings, 293.

DEATH SENTENCE. *See* MURDER.
for treason, 63, 207.
quashed, 25, 71, 142.

DEFENCE. *See under* PERJURY.
alternative, 259.
direction on, fairly put not minutely scrutinised, 283.
not to be ignored by Judge, 141, 259.

"DEMAND"
within s. 45 of Larceny Act, 1861, 307.

DIRECTION. *See under* DEFENCE; SUMMING UP.

DUMB DEFENDANT
must understand proceedings, 293.

ELECTION OF COUNTS,
in the discretion of the Court, 13.
in some cases of false pretences, necessary, 60.

ENQUIRIE
made by the Court, 10.

EVIDENCE. *See* CO-PRISONER; CORROBORATION; CROSS-EXAMINATION; FRESH EVIDENCE; PREVIOUS CONVICTION; SIMILAR ACTS.
called by trial court, 213.
inadmissible, not affecting verdict, 239.
not sufficiently dealt with at trial, considered on appeal, 290.

FALSE PRETENCES,
obtaining by, criminal, though falsity known, 112.
direction in, 81.
evidence of antecedent acts in, 186.
subsequent acts in, 39.
indictment in, 3.
election of counts in, 58.

FINGER-PRINTS,
Court examines, 90.

"FOR OR ON ACCOUNT OF ANY OTHER PERSON,"
in Larceny Act, 1901, meaning of, 153.

FOREIGNER ON TRIAL,
interpretation to, 293.

FORGERY
to support genuine claim, 248.

FRAUD. *See under* FALSE PRETENCES.

FRAUDULENT CONVERSION,
true test of, 153.

FRESH EVIDENCE
heard by the Court, 136, 138, 223.

FUGITIVE FROM JUSTICE, 75.

FULLER COURT (OF FIVE JUDGES), 63, 207; *and see* RE-ARGUMENT.

GUILTY,
but insane, no appeal from verdict of, 198.
plea of, can the Court refuse? 202.
Court of trial must be certain of, 22, 79.
appeal from, 33.

GUILTY KNOWLEDGE
in receiving, mere carelessness is not, 2.

HABITUAL CRIMINAL,
conviction as, quashed, 110.
statutory notice to, for previous assize, good, 36.
when must allege association with thieves, 108.

HARD LABOUR. *See under* SENTENCE.

HIGH TREASON. *See* TREASON.

HOUSEBREAKING TOOLS,
onus of proof of being, 245.

IDENTITY
of stolen goods must be directed on, in larceny, 276.
receiving, 19.

IN CAMERA,
appeal heard, 207, 281.

INADMISSIBLE DOCUMENT OR QUESTION. *See* CROSS-EXAMINATION.

INCORRIGIBLE ROGUE
must be so found by committing Justices, 178.

INDICTMENT. *See* ELECTION *and* INTENT TO ASSIST THE ENEMY.
bad, ground of quashing conviction, 3.

INFORMATION GIVEN TO THE ENEMY,
incorrect, when an offence, 207.

INSANITY. *See* MENTAL DEFICIENCY.
defence of, 24-5.
bars appeal on fact, 270.

INTENT,
in forgery, proof of, 248.
fraud, 186.
treason. *See* TREASON.
to assist the enemy, effect of averment of, 207, 212.

INTERPRETATION OF EVIDENCE, 293.

INVOICES
not evidence of existence of goods they enumerate, 191.

IRREGULARITY AT TRIAL,
whether affecting defendant or not, 166.

JUDGE,
duty of, on trial of foreigners, and deaf or dumb persons, 293.
mistaken on the facts, 226.
ought to dispel effect of irregular question, 166.
should not suggest new theory of commission of crime, 229.

JUROR,
letter from, to Judge, Court will not notice, 100.
separating himself from fellows, after summing up, effect of, 54.

JURY,
function of, in receiving, 45, 75.

LARCENY. *See* STOLEN PROPERTY.
as a servant, direction in, 117.

LAW,
point of, summary rejection of, 38.
not taken at trial, 164.

LIBEL. *See* REPLICATION.

LICENCE
to trade with enemy, presumption in absence of, 30.

LIMITED LIABILITY COMPANY,
manager of, criminal liability of, 153.

MANSLAUGHTER. *See under* MURDER.
may be charged despite summary conviction under Children Act, 1908, 284.

MEDICAL WITNESS,
what questions may be put to, 238.

"MENACES,"
within s. 45 of Larceny Act, 1861, 307.

MENTAL DEFICIENCY
short of insanity not a defence, 7.

MISDIRECTION. *See* PERJURY *and under* CONVICTIONS QUASHED.

MISTRIAL,
through absence of juror, 54.
venire de novo in, 21.

MODE OF DEATH
may be immaterial, in murder, 239.

MURDER,
appeals in, 7, 23, 136, 218, 229, 270, 293. *See* INSANITY.
capital sentence for, quashed, 23, 71, 142.
direction in, as to manslaughter, 136; cf. 259.

NEGLECT,
conviction for, under Children Act, 1908, no bar to indictment for manslaughter, 284.

NEWSPAPER REPORTS. *See under* PREVIOUS CONVICTION.

NOTICE
of appeal, amended by leave, 1.
to habitual criminal. *See* HABITUAL CRIMINAL.

OBTAINING BY FALSE PRETENCES. *See* FALSE PRETENCES.
chattels or credit, election of counts for, 60.
direction in, 81.

OCCUPIER'S POSSESSION
of stolen goods must be strictly proved, 130.

OVERT ACTS IN TREASON. *See* TREASON.

PENAL SERVITUDE,
first sentence of, normally for three years, 115; *and see under* SENTENCE.

PERJURY
of prosecution's witnesses, charge of, not made by defence, not to be imputed as defence in summing up, 41.

PLEA OF GUILTY. *See* GUILTY.

POSSESSION
of stolen goods, 88. *See* CONTROL.
to be strictly proved, 130.
lawful, effect of, under Larceny Act, 1861, 245.

PREGNANCY. *See under* PROVOCATION.

PREVIOUS CONVICTION,
improperly disclosed, not always a ground for quashing, 104, 239.
proved to committing magistrate should not be reported, 197.

PROCLAMATIONS,
Royal, under Trading with the Enemy Act, 1914, interpretation of, 146.

PROVISO TO S. 1 (4)
of Criminal Appeal Act, applied. *See under* TABLE OF STATUTES.

PROVOCATION,
only deceased's, a defence, 218.
whether affected by mental deficiency, 9.
pregnancy, 36.

"PURPOSE,"
meaning of, in Larceny Act, 1901, 213.

QUARTER SESSIONS
cannot adjudge an incorrigible rogue, 178.

"QUESTIONS TENDING TO SHOW, ETC.,"
within Criminal Evidence Act, 1898, 166, 251.

RAPE,
normal sentence for, 4.

RE-ARGUMENT ON APPEAL, 45, 153.

RECEIVER,
to constitute, goods must be in his control, 72.

RECEIVING,
defence in, that no larceny has been proved, must be distinct, 191.
direction in, 45, 75, 182.
guilty knowledge in, not proved by carelessness, 2.
identity of stolen goods in, must be direction on, 19.
onus in, 45, 182,
small price paid for property in, not conclusive, 130.
trifling value of property in, material, 86.

REMOTE CONNECTION WITH OFFENCE,
acts in, do not constitute "attempt," 124.

RENT
may be subject of credit, 81.

REPLICATION
in libel may be filed during hearing, 13.

ROGUE AND VAGABOND,
two convictions as, do not necessarily constitute "incorrigible rogue," 178.

SENTENCE
after many previous convictions, 43, 177, 186, 279, 292.
application to appeal against, treated as final hearing, 242.
capital, quashed, 25, 71, 142.
for rape, normal, 4.
last previous, to be taken into account, 43.
not altered, though conviction quashed, 142.
of hard labour, consecutive on another, undesirable, 27.
one of penal servitude, undesirable, 114.
quashed, as illegal, 182.
reduction of, Court's view of amount of, 256.
running from date of conviction, rule of Court on, 81, 304.
when offence trivial, 175, 186.

SENTENCES REDUCED, 6, 12, 13, 25, 27, 35, 41, 44, 51, 54, 60, 61, 89, 102, 115, 116, 142, 163, 171, 174, 177, 186, 204, 206, 241, 242, 258, 279, 289, 292, 313.
by substitution of "second division," 242.

SENTENCES REDUCED—*continued.*
notwithstanding many previous convictions, 43, 177, 186, 279, 292.
on the ground of age, 12, 13.
fact not known to trial Judge, 51, 172, 312.
ill-health, 312.
insanity, 25.
lapse of time, 256.
lengthy detention before trial, 51, 54, 89.
misdirection on major charge, 60, 136.
misunderstanding by appellant, 61.
Judge, 172.
no previous conviction on indictment, 241, 242.
other penalties, 101, 206.
previous good character, 41, 51, 103, 171, 204, 206, 289.
principal's sentence, 89, 203, 242.
remanet to be served, 5.
restitution, 256.
severity, 27, 35, 43, 54, 114, 163, 177, 186, 279, 292.

SERVANT, LARCENY AS. *See* LARCENY.

SHORTHAND NOTE,
free transcript of, 52.

SIMILAR ACTS TO THAT CHARGED,
how far evidence of, admissible, 39, 186, 229.
in false pretences, proof of antecedent, 186.
subsequent, 39.
in murder, proof of, 229.

SPECIAL VERDICT,
no appeal from, 198.
substituted, 25.

STATEMENT,
incriminating, by co-prisoner. *See* CO-PRISONER.

STOLEN PROPERTY,
identity of, direction on, 276.

SUMMARY DEALING
with point of law, 38.

SUMMING UP. *See* JUDGE; LARCENY.
Court's view of, 84, 263.
too favourable to defendant, 291.

SYSTEMATIC DISHONESTY,
proof of, 187.

TECHNICAL POINT
not taken at trial, effect of, 164.

TRADING WITH THE ENEMY. *See* LICENCE.
Act, province of Judge under, 146.
indirectly, criminal, 91 ; cf. 146.

TREASON,
intent and purpose material in, 63.

TRIAL,
a nullity, 21.

VALUE OF STOLEN PROPERTY,
full, not paid, effect of, 130.
when material, 86.

VERDICT,
special, substituted, 25.
uncertain on which charge, Court interprets as on lesser, 60.
varied, 142.

"WITHOUT LAWFUL EXCUSE"
within s. 58 of Larceny Act, 186, meaning of, 245.

WITNESS. *See* EVIDENCE *and* MEDICAL WITNESS.

Photographed from the only available copy of the original edition and reprinted by Photo-Lithography in Great Britain at The Haycock Press Ltd., London.

BIBL. LONDIN. UNIV.